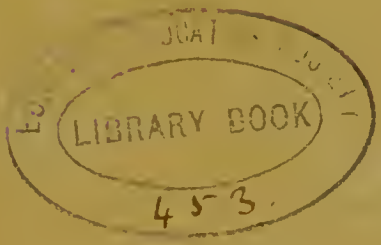
DIVORCE PROBLEMS OF TO-DAY

E. S. P. HAYNES

Presented by
Mr E Thomson.



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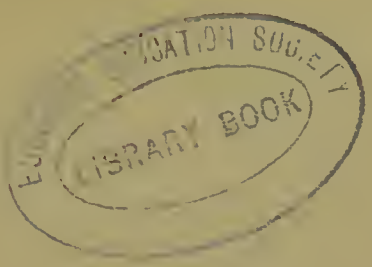
BY

E. S. P. HAYNES

AUTHOR OF "RELIGIOUS PERSECUTION," "MODERN TOLERATION AND MODERN MORALITY," &C.

"DIVORCE IS RELEASE FROM MISFORTUNE AND NOT A CRIME." (*Extract from the Laws of Norway.*)



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Dedicated to my Wife,

ORIANA HUXLEY HAYNES,

IN GRATEFUL ACKNOWLEDGMENT OF MANY USEFUL SUGGESTIONS.

PREFACE

THE courtesy of the editors of the FORTNIGHTLY REVIEW, the ENGLISH REVIEW, and the EYE WITNESS, have enabled me to collect the following papers for publication. They have all appeared between December, 1906, and December, 1911, though I began writing and working on the subject as early as 1904. The interval of six or seven years has marked a great change in public opinion. Seven years ago a fierce "taboo" was in force against the very discussion of the problem, and I owe a great debt to the editor of the FORTNIGHTLY REVIEW for opening the door of that distinguished periodical to the subject at the time that he did. Owing, however, to Lord Gorell's fearless utterances at a period of life when most men are only too ready to acquiesce in things as they are, to the ceaseless and untiring exertions of my colleagues Mr. Ramsay-Fairfax and Mr. Richard T. Gates on the Executive Committee of the Divorce Law Reform Union, and to the friendly co-operation of the newspapers, especially the DAILY TELEGRAPH, the subject became well ventilated, and finally, at the end of October, 1909, a Royal Commission was appointed.

If the reports of Royal Commissions were always acted upon there would be no necessity to republish propaganda, and the decision of the sitting Commission might be anticipated as a final settlement of the question. Unluckily, however, experience has often shown how little notice is taken of such reports. It is scarcely likely that the Commissioners will not recommend any reforms, but it is more than probable that any reforms they may recommend will be hotly opposed in Parliament and elsewhere, even if such opposition were only to be expected from men who genuinely detested any change. Opposition, however, must be anticipated not only from convinced opponents, but also from men who, consciously or unconsciously, sacrifice their own private convictions to the supposed requirements of an official or parliamentary position, and whose position lends weight to arguments which would otherwise have very little weight at all.

It is, therefore, hoped that this little pamphlet may be of use not only to friends of the cause but also to those who wish to approach the subject with an open mind. I have always tried to keep an open mind myself, and a careful comparison of these essays will show how even in a few years I have modified my opinion on one or two questions. For this reason I claim no finality for any one of my proposals, but only

put them forward in the hope of their being of use among the many other suggestions that are being made before the Royal Commission.

I cannot pretend to the advantage of any extensive experience in the region of divorce practice, which is possibly the reason why I advocate less drastic measures than, for example, the late Sir George Lewis. I can only hazard the conjecture that if the general public had had even the narrow and occasional glimpses that I have had of the divorce law and the preventible suffering due to it, or had seen the letters that come before the Divorce Law Reform Union, they would with one heart and mind set about remoulding the most unholy jumble of civil and ecclesiastical abuses that has ever disgraced the jurisprudence of Western Europe.

August, 1912.

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THE ANOMALIES OF THE ENGLISH DIVORCE LAW.

Reprinted from the FORTNIGHTLY REVIEW, December, 1906.

The Statute of 1857, by which divorce was made possible in this country without the expense of obtaining a private Act of Parliament, was largely due to the famous sentence pronounced by Mr. Justice Maule on a poor man for bigamy. Most readers will remember the fine irony with which the judge pointed out to the prisoner how, after being deserted by an unfaithful wife, and having married again chiefly for the sake of his young children, he should have tracked his wife's seducer, brought an action for damages against a person who was probably a pauper, and finally petitioned the House of Lords for a divorce, which in all would have cost about five or six hundred pounds to a man who was not worth as many pence. Most readers, however, are probably not aware that, *in spite of the facilities given for proceedings in forma pauperis, the cost for a poor man (especially if he lives in the country) of obtaining a divorce is almost equally prohibitive in our own day.* Mr. Plowden has publicly declared his belief that police

magistrates should have the power of granting divorces, and in the debates of 1857 many speakers strongly urged that such power should be given to the County Courts, where much more obscure questions of fact than cruelty, desertion, or adultery are daily proved.

Another judge has now come forward as the advocate of reform. The President of the Divorce Court[1] has recently given a weighty and authoritative opinion in favour of altering the absurd compromises and anomalies which are embodied in the Act of 1857, and result from the working of the different statutes that have succeeded it. His courageous words cannot be too highly praised. The usual apathy of happily married persons, whose happiness should at least make them realise how wretched an unfortunate marriage can be, the opposition of Protestant bishops and other members of the Church of England, who for some mysterious reason conceive themselves pledged to the maintenance of certain Roman Catholic doctrines which by a historical accident still remain embedded in the English law, and the general indifference to the sufferings of a class who are happily a minority of the whole community, greatly hamper the success of any appeal to public opinion as such, and a judicial expression

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1 Now Lord Gorell.

of discontent is the only event which is likely to bring about a better state of things.

The particular set of facts on which the President had to decide were as follows:—The wife, who was the petitioner in the suit before him, had married her husband, the respondent, in 1891. In 1896 the respondent had given way to drink, and, although living with his wife, neglected to provide for her and his child, and was being kept by her. The wife consequently left him and went to her mother, and in September, 1896, obtained an order under the Summary Jurisdiction (Married Women) Act 1895 that she should no longer be compelled to cohabit with the husband, and that he should pay her a weekly sum of 10s. This he never did. Subsequently the wife discovered that the husband has been guilty of adultery, and in August, 1905, petitioned for a divorce on the ground of his adultery and desertion, which latter offence, if he was guilty of it, had lasted considerably longer than the two years' limit required by the Act of 1857. The President found that the husband had not, in fact, been guilty of desertion at all, since he would have been only too glad to come back and live on his wife again, and that as he had been guilty of adultery only, the wife was merely entitled to a judicial separation, with an order against the husband for her support. She was, therefore, no better able to obtain

maintenance than before, and was condemned to a single life during the life of her unfaithful husband.

The following important results appear from this state of the law:—

(1) In no circumstances whatever can a wife obtain a divorce from a penniless husband except by going to the expense of an action in the High Court, for which she may lack the means; and if she has previously obtained a magistrate's order she is probably altogether debarred from a divorce, for, if she is not bound to cohabit with her husband, he cannot commit the matrimonial offence of desertion, and it is most improbable that he will have any opportunity of committing the offence of cruelty.

(2) It is clear that a husband is more severely punished for committing the single offence of adultery than if he is guilty of adultery and desertion or cruelty, since in the latter case he obtains liberty of re-marriage, and probably does not suffer any greater financial loss by way of alimony.

In the latter part of his judgment the President pointed out that the magistrates granted over 7,000 orders of this kind a year, "so that at any given time there must be an extremely large number of people living separate under orders made during the previous years." Tracing the history of the law, he showed

how the "remedy of permanent separation" was condemned by the Royal Commission issued by Henry VIII., and renewed by Edward VI., on the ground that it "produced great abuses and scandal in the marriage state, and that the innocent party should be permitted to obtain a divorce for . . . desertion." He might have added that the remedy of divorce was also recommended for certain kinds of cruelty. Undoubtedly our law, but for the early death of Edward VI., would have resembled that of Scotland and all other Protestant countries but this country and some of our Colonies, in giving women the right to divorce an unfaithful husband, and to both men and women the right of divorce in cases of desertion. The President considered it desirable "to express the conviction that permanent separation without divorce has a distinct tendency to encourage immorality," and he doubted whether "any reform would be effective and adequate which did not abolish permanent separation as distinguished from divorce, place the sexes on an equality as regards offence and relief, and permit a decree being obtained for such definite grave causes of offence as render future cohabitation impracticable and frustrate the objects of marriage."

We have only to turn to the debates on the Act of 1857 to find Lord Palmerston condemning judicial separations, Mr. Gladstone advocating

equality between the sexes, and Lord Lyndhurst most vehemently supporting the proposal that desertion should be made a cause of divorce.

The above extracts from the judgment of the one person in England who might be expected to be entitled to express a proper opinion on the matter might seem sufficiently reasonable to the average person. They met, however, frankly hostile criticism in *The Times*. The writer of a leading article on the judgment stated that "the time has not come, if it ever will come, for removing all the anomalies which the President condemns." And why? Because "in the opinion of many persons—some would hold a majority—in this country and several others, the right course in this matter is not to be determined by considerations of public policy, however clear or strong." Such an argument might be expected from anarchists, anti-vaccinationists, or the Peculiar People, but it is somewhat startling in the columns of *The Times*.[1]

Let us try to understand the sentiments of the "persons" referred to. In the first place there is the religious argument. The Council of Trent recapitulated the doctrines of the Roman Catholic Church in prohibiting divorce *a vinculo*

[1] I do not want to suggest that *The Times* is not the best informed and most intelligent daily paper in the world. I think it is, but I cite it for that very reason. Such sentiments show the intensely clerical sentiments of many otherwise open-minded Englishmen.

for any reason whatever, but it also formulated the doctrine that celibacy and virginity were ethically superior to the married state. The Council, no doubt, forgot to take official cognisance of the condition of contemporary monasteries and nunneries, just as the modern opponent of divorce apparently ignores the social condonation of adultery which would seem to prevail in countries like Italy and Spain, where no divorce is allowed.

To support judicial separations through thick and thin, in spite of all that is said of their effects on society, seems rather like vindicating religion at the expense of morality. The whole doctrine is logically derived from the Early Christian and medieval conception which, for some reason or other, associated saintliness with celibacy and virginity. It must not be forgotten that saintliness was also associated with deliberate want of personal cleanliness, but personal cleanliness has ceased in more modern times to be morally discreditable.

There is, however, a widespread feeling that nothing should be done to weaken the marriage tie, and that every opportunity should be given for reconciliation. The strenuous efforts of magistrates, of lawyers, and of the relations of the disputing spouses are in almost every case exerted to try to mend their quarrels. Yet not only are such efforts unavailing, but even

abandonment of the closest personal ties and the hatred of scandal and publicity generally fail to deter two human beings whose society has become intolerable to each other from recourse to litigation. The truth is that married persons are not usually united by any sense of legal coercion or obligation. The private considerations that go to prevent the dissolution of a home are far more powerful than any inducements held out by the law. Where all these have vanished, the husband will agree to pay almost any alimony to be rid of the wife, and the wife will face any publicity to be rid of the husband, and if they are not free to re-marry, but are merely united by the legal caricature of a union called a judicial separation, it is only too probable that other ties of an illicit kind will result.

It only remains to be remarked that under the present law of Scotland, by which marriage was, and is, regarded as a contract dissoluble at the option of either party for such a breach of its terms as shakes its very foundations, neither society in general, nor the family in particular, ever ceased to exist or flourish.

The proposals for alteration of the law, which would, I think, be approved by many thoughtful persons, are as follows:—

(1) To make wilful desertion for three years a cause for divorce.

(2) To give equal rights to both sexes.

(3) To give a discretionary relief of divorce where the home is broken up by lunacy.

(4) To afford facilities for divorce in the County Courts.

I shall examine each of these points separately.

(1) To make desertion a cause for divorce is only to follow the example of all Protestant countries. The same precautions that are now taken to prevent collusive suits would no doubt remain in force. The hardship of the present law is very great, both for men and women. Most readers will remember the case of *Regina* v. *Jackson*, where a husband was deserted by his wife at the church door, and was unable to obtain any remedy. The Ecclesiastical Courts at least gave a remedy. If the absent spouse would not return, he or she could in the last resort be imprisoned, but since the Act of 1884 all that can be obtained is a payment or settlement of money. Of what use is this right to a husband? If the wife has any money at all, it is almost certain to be subject to what is called a "restraint on anticipation," and against this formidable machinery even the High Court is powerless.

The hardship on the wife presses in another way. Her husband may run off with another woman to the Antipodes, and it may require a

small fortune to trace him. Meanwhile the wife and children may be left absolutely without any means of support. A poor woman with a large family is, therefore, condemned to all the miseries of indigent widowhood until her husband dies, and even then she is no better off unless she can legally prove his death, which cannot be done unless his whereabouts are known to her.[1]

If a poor woman obtains a magistrate's order on the ground of desertion she can never get a divorce at all, even if her husband commits adultery, unless he comes back and assaults her. For the period of desertion required under the Act of 1895 is less than the two years' limit required by the Act of 1857, and the desertion of the husband is terminated by the magistrate's order which relieves the wife of obligation to cohabit with the husband, and if the wife obtains this she cannot complain of desertion as from the date of the order.

(2) To give a wife the right of divorcing an unfaithful husband seems to be only just, whether or not the offence may be less grave in the husband than in the wife. I have before

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[1] She can of course marry again if she does not hear of him for seven years, but then risks an abortive prosecution for bigamy, as the burden of proof lies on her and the illegitimacy of children by the second marriage. The same considerations apply also to men.

alluded to the President's remark that the husband is more seriously punished for committing one matrimonial offence than by committing two. But the wife also suffers by being condemned to a single life for the rest of her days. There may be cases in which the wife might condone her husband's misconduct, but the serious consequences of it ought clearly to entitle her to the right of divorce. It is difficult to deal with all the aspects of this question, but no one with any experience can deny the grave physical dangers that may result to the wife even if the husband be not criminally careless, and owing to the testamentary freedom of the husband cases are not unknown where a man has left the bulk of his property to a woman with whom he was on more intimate terms than with his wife.

It must, moreover, be apparent that although the infidelity of a wife may be a more serious offence against society than that of the husband, yet the consequences of the husband's misconduct may be quite as serious for a wife personally as her offence may be for society at large.

(3) The proposal to give a discretionary relief by divorce where the home is broken up by lunacy is, perhaps, a more doubtful matter. The insanity of a person at the very moment of marriage is in law a ground for annulling the

marriage, but if the ceremony was entered into during a lucid interval, it is not, however great may have been the deception practised by the relatives of the lunatic upon the unfortunate person who contracts such a union. Insanity is a ground for dissolving any kind of ordinary contract, and the fact that such a marriage implies the probable birth of insane children seem only to add a further reason for making such a contract dissoluble on grounds of public policy. Certain precautions, however, might be taken. For example, the insanity would have to continue for a period of five years, and the doctors employed to report upon the patient might be specially appointed by the Court, as they now are in nullity cases.

(4) I do not think that much more need be said about the policy of giving facilities for divorce in a County Court. Even if the *in forma pauperis* procedure is adopted in the High Court, the expense of bringing witnesses to London and obtaining proper advice there would in many most deserving cases be prohibitive, and I believe that there is some ground for supposing that many cases brought *in forma pauperis* are brought by persons by no means so poor as they claim to be. Until such facilities are given it is difficult to see how the state of the law with regard to the poor has been materially improved since the days of Mr.

Justice Maule, and few who have even a superficial knowledge of the working classes would not admit that there is room for considerable improvement in their ideas of the sanctity of marriage and respect for the law of marriage.

There is, perhaps, a common tendency to suppose that there can be no logical choice between prohibiting divorce altogether and allowing it on grounds which make it, in fact, dissoluble by incompatibility of temper. If we are to have a compromise, it may be argued, why should not the compromise of 1857 be as good as any other? I cannot see why this argument might not be used with equal force of any other contract. Yet what should we think of a person arguing that the commercial stability of a society depended upon making business partnerships indissoluble except by the deaths of the parties thereto? It is clear that people who find they have a common interest in working together will remain together, and that if they have not, no amount of legal coercion will make them do so. The mere fact that marriage has yet another element, viz., personal affection and intimacy, added to that of common interest, makes the argument even stronger, since in case of dispute an element is introduced of personal aversion.

There is only one other point upon which I need touch, and that is one of procedure more

than legislation. It is the ease afforded by the present publicity of the Divorce Court for inflicting an injury upon the reputation of a person which can never be wiped out. I may perhaps be allowed to give some typical instances of this. In a recent suit a charge of misconduct was made by a wife against her husband in connection with a dead woman. The husband of the dead woman appeared in court to defend her memory, and the charge fell to the ground; but why should so grave and apparently unfounded an attack upon a dead woman have been published in the newspapers? No innocent woman can be accused of what is an offence of the same gravity as a criminal offence for a man and escape the imputation that she was given the benefit of the doubt. A husband may falsely accuse his wife of adultery, and after the suit is over she is compelled to go back to his house if she wishes either for maintenance or the society of her children. A husband or wife may maliciously accuse a doctor or a young unmarried girl of adultery, and the persons thus accused may for more than a year have no chance of vindicating their characters. Even a triumphant refutation of the charge brings no remedy against the accuser. Any person, if falsely and maliciously accused of dishonesty, may subsequently take proceedings against his or her accuser for malicious prosecution, but, if

maliciously accused of adultery, has no such remedy. There is, I believe, more publicity in the English courts, so far as these matters are concerned, than elsewhere, and this is directly due to the ecclesiastical notion that offences of this type should be exposed to public censure. Little enough appears to be thought of the suffering caused to innocent parties, who are clearly entitled to consideration. If we are to have publicity at all, I cannot see why the same procedure should not be adopted as prevails with regard to the solicitors accused of professional misconduct. The proceedings are heard in private, and if the solicitor clears himself the accusation against him is not made public; if, however, he is found guilty, the conviction is publicly recorded against him. Surely an innocent man or woman should have the same privileges when confronted with an accusation, the very utterance of which may irreparably damage him or her.

THE COLONIAL MARRIAGES ACT, 1906.

Reprinted from the FORTNIGHTLY REVIEW, May, 1908.

Our legislators, when ostensibly anxious to remove an anomaly, frequently succeed in creating fresh anomalies by way of compromise. The Colonial Marriages (Deceased Wife's Sister) Act is a good instance in point. The effect of it is, briefly, as follows: In Colonies as important as Australia, Queensland, Canada, Natal, Cape Colony, and New Zealand marriage with a deceased wife's sister is legal. Before the passing of the Act persons domiciled and married in such Colonies were, according to our law, legally married, and their children were legitimate for most purposes, but were assumed to be illegitimate for the following purposes: since (1) they could not *inherit* English land at all, *e.g.* in cases of intestacy; (2) if they succeeded to English land under a will or settlement they were treated by the Inland Revenue as strangers in blood to their parents; and (3) they could not succeed at all to honours and dignities.

Lord James of Hereford well described a common example in the debate on the second

reading of the Bill.[1] "A man came to this country after having married his deceased wife's sister in the Colonies, and died leaving freehold and leasehold property. Thereupon his representative in making a return would declare that A. B. having made a will leaving to his son C. D. *lawfully begotten* certain leasehold property, that property should pay 2 per cent. duty. Then he would go on to say that A. B. having left C. D. *not born in lawful wedlock* certain freehold property, the latter should pay 10 per cent. duty."

The act accordingly relieved from these disabilities the issue of a Colonial marriage with a deceased wife's sister; and the Deceased Wife's Sister Act, 1907, by legalising such marriages in England, makes the Act of 1906 unnecessary, but intensifies all the anomalies of the situation. The legal origin of the above-mentioned disabilities is directly traceable to the growth of local and territorial systems of legislation in the Middle Ages. Such legislation entirely controlled questions relating to the ownership of land or immovable property situate within the bounds of such local or territorial jurisdiction. On the other hand, movable or "personal" property (which in England includes leaseholds) devolved according to the law of the owner's

[1] Here and in the following pages I cite the report of the debate in *The Times* of May 16th, 1906.

domicil. The medieval system still survives in our jurisprudence, and gives rise to the anomaly which has now been abolished only in regard to Colonial marriages with a deceased wife's sister.

It is not, however, entirely clear whether the English law of real property was ever in fact properly invoked, and the Act itself begins with a statement that its purpose is to remove any doubts.

In all questions which involve our Courts recognising the validity of any given marriage the doctrine has constantly been laid down that the capacity for contracting any marriage depends exclusively on the domicil of the person. In his *Conflict of Laws* Mr. Dicey writes that in its widest scope the old prohibition of English law against marriage with a deceased wife's sister, and the existing prohibitions, *e.g.* against marriage with a deceased husband's brother, applies to all persons, whether British subjects or aliens, domiciled in England, and *to such persons only*.[1] This doctrine holds good of all marriages, except marriages in polygamous countries, or marriages "stamped as incestuous by the general consent of Christendom." Marriages between a brother and sister would presumably fall within this definition, but an Italian marriage with a

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[1] *Conflict of Laws*, p. 645. Note 1.

deceased husband's brother has been judicially excepted from the definition.[1]

In this last case an English lady domiciled in Italy married her deceased husband's brother, which the Italian law recognises as a valid marriage, and the marriage was recognised as valid by the English Courts. By virtue of the same doctrine a divorce for desertion between two parties domiciled in Scotland is recognised as valid in England. The doubt that exists, therefore, is as to the nature of that validity. But is it not expedient, not to say just, that *all* marriages celebrated according to the law of the domicil of the parties should be recognised as valid *for all purposes* in England? Is it not oppressive, on grounds of common justice, to go behind the law of a person's domicil and to apply the law of England merely in regard to succession to land, honours, and dignities? And would it not be unquestionably the better plan to remove all doubts by dealing with the whole question of principle involved instead of capriciously relieving a small class of persons?

For the doubts referred to in the Act apply to a whole number of other persons with whose position I will presently deal. It is astonishing that no attempt was made to go to the root of the matter and to abolish the medieval

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[1] In re Bozzelli's *Settlement*.

distinction between land and personal property in this instance.[1] This proposal is not so daring as it sounds. Our law of real property still bears many traces of its feudal and medieval origin, but for almost a hundred years our legislators have done their best to assimilate the law of real property (so far as possible) to that of personal property. This policy reached its culmination in the Land Transfer Act of 1897, which vested land in the personal representatives of the deceased owner.

As the law now stands, the following persons are left to suffer whatever disabilities were removed by the Act for the benefit of a particular class:

(1) The children of persons who marry a deceased husband's brother or a deceased wife's niece. Such marriages are legal in some Colonies, and in many foreign countries, not to say the Channel Islands.

(2) The children by re-marriage of persons of doubtful domicil who re-marry after

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1 This would merely have meant abolishing the highly artificial rule laid down in *Birtwistle* v. *Vardill* in 1840, which prevents English land descending upon an intestacy to persons recognised as legitimate by English law for *all* purposes except that of succeeding to land, honours, and dignities. I call it artificial, because the law of real property in England is here made to ride roughshod over the law of a person's *status*, which depends upon his domicil. Honours and dignities follow the feudal law of descent.

being divorced on grounds not recognised as grounds for divorce by English law. The divorce laws of Scotland, Cape Colony, Natal, New South Wales, Victoria, and New Zealand all recognise such grounds, *e.g.* they all allow divorce in cases of desertion, and in one Colony simply to persons residing there.

(3) The children of all persons who legitimate such children by subsequent marriage in Colonies where such legitimation is legal.

(4) The children of all Englishmen domiciled in foreign countries who legitimate such children by subsequent marriage in countries where the law allows it.

Lord Halifax made special reference to the second class above referred to in the debate. Logically, he was, I think, right to include them in the discussion.[1] If the law of England can once be logically applied, it is clear that a person divorced on grounds not recognised by English law labours under the same incapacity for marriage (to another person) as prevents a woman domiciled in England from marrying

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[1] "Logically," but not legally, because Colonial and foreign judgments are accepted as binding both in regard to law and the fact of domicil. But in India and in the Colony of Victoria divorce is granted on the ground of residence only, and English law recognises nothing but domicil.

her deceased husband's brother. But how can it be expedient, merely in regard to English land and honours, for the English Courts to be compelled to go into the whole history of a Colonial divorce previous to a subsequent marriage, and are such proceedings any less likely to give offence to our Colonies than the doubts which previously existed concerning the effect of a marriage with a deceased wife's sister?

In connection with the last two classes it may be mentioned that legitimation by subsequent marriage is lawful in Scotland, in many of our Colonies, in most European countries, and in many of the United States of America. It would no doubt also be the law of this country but for the Toryism of the English barons of the thirteenth century, who opposed the idea with the somewhat unintelligent remark *Nolumus leges Angliæ mutare.*

The above considerations taken by themselves might well justify some effort towards achieving a logical simplicity in our laws. But I have by no means exhausted the legal tangles of the situation. A fresh collection of them arises from the English preference of the medieval criterion of domicil to the modern criterion of nationality which is almost universally adopted on the continent.

Domicil is by no means so easy a matter as it sounds. A man may live part of the year in

one country, and part of the year in another, and his domicil is difficult enough to determine in that case. Again, an Englishman may live for years in a foreign country with the intention of returning to England, yet die there. In this case, owing to his intention, his domicil is held to be English. A man's habits and intentions may be disputed about with great ease for years after his death without any very clear result being obtained. The test of nationality is obviously more certain than that of domicil.

The question of domicil is closely bound up with succession to English land under a will or settlement, and I will give three examples by way of illustration.

Example 1.—English land is devised by will "to the eldest son of Mr. John Smith," whom I will call William Smith. Mr. John Smith died domiciled in a colony which permitted legitimation by subsequent marriage, and William Smith is the eldest son of the family thus legitimated.

To take the land under the will William Smith has to prove to the English Courts (1) that his father died domiciled in the Colony, and (2) that the law of the Colony permits legitimation by subsequent marriage.

The proof of domicil usually involves either (*a*) taking evidence in the Colony on commission, or (*b*) bringing Colonial witnesses to England.

If, however, John Smith is still alive, William Smith will probably be advised to petition for a degree that he is legitimate under the Legitimacy Declaration Act, 1858. This sounds simple enough, but in addition to incurring the expenses of proving domicil, William Smith is in this procedure, for some reason, made to pay the costs of all parties to the suit (probably his opponents) whether he succeeds or not.

William Smith's title to take under the will arises by virtue of a decision of the Chancery Division in 1892,[1] and not from any statute.

Example 2.—It has not yet been decided if he could take the land, supposing that it had devolved to him under a settlement, *e.g.* as tenant in tail, but high legal authorities are of opinion that the same principle would apply and that he would succeed to the land in this case also.

Example 3.—Supposing John Smith had died in France, or, in fact, any European country which prefers the criterion of nationality to that of domicil, even more complications arise. Let us assume that William Smith surmounts all the difficulties of proving that his father died domiciled in France. The question then arises whether or not he is legitimate by French law.

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[1] In re Grey's *Trusts*.

If this inquiry be addressed to a French lawyer, the French lawyer before replying asks, "Was the late Mr. John Smith a British subject or not?" Few Englishmen formally abandon their nationality, and there is every probability that Mr. Smith did remain, in fact, a British subject. "In that case," the French lawyer will say, "we have nothing to do with the matter. These questions are by our law referred to the law of the nation to which Mr. John Smith belonged, and we therefore cannot give you any opinion as to William Smith's legitimacy according to our law, though it is true that our law does permit French citizens to legitimate children by subsequent marriage."

Here is an interesting deadlock known to lawyers as *renvoi*, *i.e.* the matter referred to French law is by French law referred back to English law. By this time Mr. William Smith will be fairly exasperated even if he is still solvent. In this particular case, however, he will probably succeed. The decisions in France and Belgium now admit the principle that Mr. William Smith should be allowed to take the benefit of their laws, and Mr. William Smith may therefore be regarded as legitimate by the law of Mr. John Smith's domicil. But many Italian jurists are of a different opinion. The question obviously permits of being well argued on both sides.

I have made but a rapid survey of the complications due to our law as it stands, but there are possibly many more, and in these days of travel the cases become more frequent. I venture to submit that the present state of things is beneficial only to lawyers.

I hope I have made it clear that an alteration of the law of real property tends in no way to alter the law of marriage or to involve any approval or disapproval of other laws of marriage. In the debate on the second reading of the Colonial Marriages (Deceased Wife's Sister) Act some of the speakers appeared to imagine that the English law of marriage was in some way at stake. Some confusion of thought was certainly pardonable, though it was perhaps odd to find a distinguished prelate solemnly discussing the merits of a man marrying his "*widow's niece*"!

Clearly, however, the difficulties in regard to proof of domicil and the *renvoi* will remain so long as we adhere to our criterion of domicil to the exclusion of nationality. Why not then, it may be said, adopt the criterion of nationality? The answer is that to be a British subject is merely to be subject to a number of conflicting laws of marriage and divorce within the British Empire. I have already mentioned the Colonies in which the grounds for divorce are different from those accepted by English law. I need only add that in Ireland and certain Canadian

provinces a divorce can only be obtained by Act of Parliament, while in the Channel Islands and Newfoundland there is no divorce law at all. It is more than arguable that owing to the peculiar jurisdiction of the Indian Courts in divorce a man may be divorced in Calcutta, and return to find himself married to the divorced wife in London. There can be little doubt that the present system brings about a number of marriages and divorces which are legal in one place and illegal in another, and that the uncertainties of domicil are regrettable from every point of view.

Some attempt at unifying the marriage and divorce laws of the British Empire must obviously precede any attempt to remedy the uncertainties of domicil. The prospect is enough to daunt the boldest statesman, but perhaps we may gather some courage from the example of the United States. Across the Atlantic a National Divorce Congress, including "bishops, governors, jurists, and sociologists," has put forward "a model Statute" for the whole Commonwealth. The statute recognises six grounds for divorce, viz.:— adultery, bigamy, conviction and sentence for crime (followed by continuous imprisonment for at least two years), extreme cruelty such as to endanger life and health, and habitual drunkenness or wilful desertion for two years. This courageous

attempt at unity may fail, but it was certainly worth making. Is it impossible to submit the same problem to an Imperial Conference? The difficulties are scarcely more insurmountable in the case of the British Empire than in the case of the United States. Some such attempt is already being made in regard to the law of naturalisation.

The indifference of Englishmen to abuses that arise from slipshod thought and legislation is truly surprising. To start out by denying any right of divorce at all is logical enough. But to grant such a right in a haphazard way, to adopt a medley of medieval rules for determining legitimacy, and calmly to leave a whole number of anomalies unremedied, can only be due either to laziness of mind or to the knowledge that such measures are not immediately comprehensible to the electorate at large, and hence have little value on a party programme. It is women and children who suffer most from the present state of confusion, and surely it is time that something should be done for them.

The remarks which Lord Brougham made on this subject more than sixty years ago have lost none of their force to-day:—"That there should be a set of questions incalculably important, perhaps the most important, to the interests and feelings of individuals which can ever arise in Courts of Justice, and that these questions

should be left surrounded with doubt and incapable of decision for want of some statutory enactment regarding the subject-matter, is truly lamentable, and not a little discreditable to our jurisprudence."

There is undoubtedly a crying need for the appointment of a Royal Commission, such as Lord Halifax has suggested, to clear away the absurdities which I have endeavoured to describe.

OUR DIVORCE LAW.

AN EXPLANATION OF ITS ANOMALIES AND AN ARGUMENT FOR ITS REFORM.

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The conventional attitude to divorce resembles the Early Christian attitude to marriage. The Early Church held up celibacy and virginity as the ideal state of men and women; the sexual relation, like other corporeal indulgences, *e.g.*, taking a bath, was in itself sinful. The marriage tie was, therefore, analogous to a license to sell intoxicating liquors: it severely limited and regulated an instinct, the satisfaction of which might lead to untold mischief. The only justification of marriage was the fear that an absolute refusal to recognise the existence of reproduction by natural means (instead of by what Gibbon calls a "harmless process of vegetation") might lead to even greater evils.

The Early Christian theory of marriage as an evil has never found its way into English law. On the contrary, the State has always

directly discouraged anything likely to diminish the supply of fighting men; and our Germanic ancestors, before becoming acquainted with Christianity, regarded divorce as a necessary remedy for adultery, desertion, and even involuntary capture of the other spouse by an enemy.

The doctrine of marriage being indissoluble in England is almost entirely bound up with the Roman Catholic doctrine of marriage being a sacrament, which was never questioned in Europe till the Reformation. The sacramental doctrine once renounced, Churchmen asked themselves whether marriage was, or was not, of its nature indissoluble. This, of course, involved an appeal to the primitive Church, and more especially to the Early Fathers, many of whom were inclined to concede the privilege of divorce instead of separation to the innocent party.

The net result was that Cranmer and others drew up a scheme for altering the ecclesiastical law so as to grant divorce for adultery, desertion, cruelty, and even incompatibility of temperament. The other main feature of the scheme was the abolition of separation without divorce as a remedy. They condemned separation as a cause of immorality. This scheme, if carried out, would have assimilated our laws to those of other Protestant countries. It was never

accomplished owing to the early death of Edward VI., but the ecclesiastical courts, nevertheless, granted decrees which were deemed to give liberty of remarriage, till the end of the sixteenth century, when the Star Chamber intervened, and a "bond" of chastity was required from the parties who obtained a decree. No distinction in this connection was made between innocent and guilty parties. From about 1700 and onwards the practice of obtaining a divorce by Act of Parliament came into being.

Such an Act required as a condition precedent, first, a civil action, and, secondly, an ecclesiastical decree of separation. This practice continued till 1857, when the law was altered owing to the attack made upon it by Mr. Justice Maule in 1845.

From about 1700 to 1857 the ecclesiastical courts granted these decrees with the full knowledge that they could be used as instruments to obtain a divorce by Act of Parliament, the bishops voting for the Acts as they did until 1904 in the case of Irish divorces.[1] A number of the bishops supported the doctrine that marriage was dissoluble, and Archbishop Sumner and Tait, then Bishop of London,

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1 Irish divorce bills are now passed into law by a committee of the law lords, which is scarcely constitutional.

actively supported the Matrimonial Causes Act, 1857. This statute represented a compromise between the advocates of divorce and those who from convictions based partly on particular readings of the Gospels, partly on grounds of prejudice against any innovation, upheld the doctrine that marriage should be indissoluble. There was, of course, also a large body of men who professed to be bound, and to bind others, by the Roman Catholic dogma. These latter persons have taken upon themselves the responsibility of discouraging the clergy from marrying a divorced person, whether innocent or guilty, and by so doing have done much to destroy the national character of the Church of England.[1]

Whether or not the Church of England is entitled to repudiate the precept and practice of Cranmer and other bishops and clergymen in the past is a problem that may be relegated to the theological jurist, but those who regard the existence of a national church as an integral part of the national organism, are naturally inclined to deplore the present official attitude of the Church.

The doctrine of indissolubility, however, finds other supporters on purely rational

[1] These clergy will of course marry a co-respondent to any woman other than the wife he has seduced.

grounds, which were very well expressed by Lord Redesdale when he dissented from the recommendations of the Royal Commission in 1850. He strongly objected to divorce on the ground that it "closed the door, once and for all, on the possibility of reconciliation." It was also for this reason that the Commission advocated the remedy of separation instead of divorce in cases of desertion or cruelty, and, in the wife's case, for adultery only.

The strength of this argument cannot be denied, though cases are known of divorced persons remarrying one another. Even if the parties separated were tempted to misconduct during the period of separation this evil would be small compared with destroying any prospect of their actual and ultimate reunion. The answer is that examples of such reunion are extremely rare. Death itself does not so effectually destroy the marriage tie as the infliction and remembrance of an intolerable wrong, and nothing less than this is likely to bring really worthy persons into court. An unworthy person may occasionally use the Divorce Court for his or her own purposes, but the absence of such a court would not improve the conduct of such a person. Considering the ties that have to be destroyed, the scandal that has to be faced, and the duration of time between the filing of a petition and the making of the

decree absolute, the possibilities of reconciliation are almost certainly extinct before a marriage is finally dissolved. Examples of reconciliation are, of course, almost as rare where the suit fails.

Lord Redesdale's second argument was that the mere knowledge that the marriage tie could be dissolved would necessarily increase the chances of divorce and thus diminish the chances of domestic happiness. This deserves to be discussed in detail, though Lord Redesdale only indulged in generalities. Roughly speaking, there are three types of marriage. There is the supremely happy marriage of well-assorted persons which cannot be dissolved except by death. In such marriages even the incurable insanity of one spouse would leave the other without any heart to contract another marriage. The experience of such a marriage must necessarily prejudice against legal divorce any person who cannot realise, either in imagination or by the sympathetic observation of other persons, the possibilities of misery in an unhappy marriage. This marriage is obviously left untouched by any legislation.

The second type of marriage is that of persons who are not perhaps particularly congenial to each other. The obvious restrictions imposed by civilised manners upon young men and women really getting to know one

another may have led to their forming quite inaccurate notions of each other. The mistake may be on one side or mutual, but it is not necessarily irremediable. They start with a common interest and a necessity of mutual accommodation which is automatically strengthened as years go on. The existence of children is for decent people an obvious restraint upon wayward desires. Among other obvious restraints come the domestic instinct, the desire for the approval of society, the influence of habit, and mutual affection and respect. These restraints are often potent enough to prevent the innocent party taking legal proceedings against the other, but the guilty party is further restrained by such motives as the wife's fear of social ruin, and the husband's fear of losing lucrative appointments or being forced to sacrifice a considerable part of his income to a wife who is no wife, until her death. It is, therefore, the ordinary human affections and a healthy public opinion that keep even uncongenial persons together, and these considerations operated most forcibly to prevent the wholesale prevalence of divorce during a long period of Roman history when the facilities of divorce made marriage almost dissoluble at will.[1]

[1] There is, of course, no reason why uncongenial persons should remain together except with a view to bringing up

The third type of marriage covers many varieties that obviously need the remedy of dissolution. We need not always presume delinquency. A person married to an incurable lunatic of five years' standing is obviously entitled to relief on grounds of public policy, and the only possible argument against granting such relief is the lack of absolute certitude in medical knowledge. Yet such lack of certitude does not prevent the State from asserting an absolute control over the person and property of a lunatic.

Again, two persons may marry and discover a perfectly genuine incompatibility of temperament. The existence of such incompatibility in a purely physical sense is as well known among human beings as it is among animals. There seems, therefore, an obvious presumption that it can be psychical as well as physical.

Milton vividly described such incompatibility in his essay on divorce. To give such persons even a limited right to determine their union would possibly be dangerous. But where the incompatibility is genuine the fear of public opinion will not keep them together and they will inevitably take steps to dissolve the tie.

If one of them, thereupon, inevitably proceeds

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their children under the joint care of father and mother. Where uncongeniality becomes aversion the parents are better apart for the children's sake.

to incur the disapproval of society by giving the other the right to dissolve the tie, the compulsion of the wife to adultery, or of the husband to desertion or cruelty and adultery, is more harmful to public morals than the compulsion to desertion under a law which would grant divorce for wilful and malicious desertion, as in Scotland.

No legislative or administrative machinery can ever make such divorces impracticable. To impose the necessity of a matrimonial offence is merely to impose a powerful test of sincerity. Many persons would prefer not to make adultery an absolute essential constituent of the test, as it is now.

Coming to the question of delinquency, there is the marriage where one party is guilty of conduct which frustrates the objects of marriage, and this is dealt with, however inadequately, by our law. Where both parties are guilty of such conduct our law denies relief except in special circumstances, and in this respect again it differs from other Protestant countries and, to the detriment of public morality, follows ecclesiastical principles which have been elsewhere discarded.

To sum up, Lord Redesdale and thinkers of his type deny any remedy but that of separation in the third class of marriages above described. Their principal arguments are that

divorce closes the door to reconciliation and tends to break up the home.

They ignore the facts that no society has ever yet found itself able to dispense with divorce or its equivalent,[1] and that, except in a few Roman Catholic countries and Colonies which have imported their law from England and not since changed it, the remedy of separation without remarriage has been abolished because of the obvious temptations it creates to illicit intercourse. They ignore the fact that England has set up a more rigorous state of things than other Protestant countries, and that the Roman Catholic Church solves the problem of divorce with the unsatisfactory device of fictitious annulment. In the Middle Ages a former contract with another person or "a degree of relationship even to the remotest branches" (which was "sometimes discovered by means of a fictitious genealogy") was sufficient cause to annul a marriage, however sacramental.[2] Even this remedy, however, was only to be bought at a price, and the poorer classes presumably took the law into their own hands.

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[1] Either in the shape of nullity decrees, or by change of domicil or nationality. I refer to what goes on in European countries where divorce is prohibited, *e.g.*, Italy and Austria.

[2] There were also other devices, such as taking vows of chastity.

These facts unquestionably throw the burden of proof on the opponents of divorce. It is for them to prove that husbands and wives separated by law are frequently reconciled, and even if they could do this they would have to set off against them the number of husbands and wives who remarry after being divorced. It is for them to prove that divorce breaks up more homes than are broken up in Roman Catholic countries, and even if they could do this they would have to take into account the systematic tolerance of open adultery that the absence of divorce so frequently creates. Much may perhaps be said for adultery that does not break up the home, but it is not usually said by opponents of divorce.

Lord Redesdale further opposed any change in the law on the ground there was "no popular demand for it." It seems difficult to understand why the Act of 1857 was passed without any popular demand, but the statement is worth noticing because it might quite as easily be made now.

I shall hereafter have something to say about the traditional indifference of English legislators to personal, as compared with proprietary, wrongs, but, apart from this, the test of popular demand cannot be so fairly applied to this question as to others. Most people are notoriously indifferent to forms of misery

unknown to themselves and unlikely to affect themselves. The victims of the law as it now stands do not like to air their grievances by mass meetings or any other form of publicity, and if they did so they would certainly be reproached with the suggestion that they were unduly biassed in the matter. They either grin and bear their sorrows or disregard the law. Putting aside the hostility of Roman Catholics and their followers, most Englishmen regard divorce, as I said before, as analogous to a license to sell intoxicating liquors. The parallel is instructive because, just as many men will not publicly rebuke the overbearing tyranny of some teetotalers for fear of being thought to advocate the cause of the drunkard, so many men are afraid to advocate the rational extension of divorce for fear of being thought to advocate free love. Rational divorce is, therefore, as difficult to promote as the existence of rational places of public refreshment. In fact it is more difficult, because Catholic-minded persons regard divorce with far more horror than inebriety.

In these circumstances the only persons likely to speak freely are those who by their avocations are brought into direct contact with the anomalies of the law, that is to say, judges, counsel, magistrates, and solicitors. In April, 1906, Lord Gorell, then President of the Divorce

Court, condemned the present law, root and branch. His example was speedily followed by many magistrates and by a solicitor so experienced as Sir George Lewis, who had also denounced the law twenty years ago. The newspapers sounded an unanimous chorus of approval. A Royal Commission was on many sides suggested. Yet in spite of this nothing was done by the Legislature, although no stronger expression of public opinion could have been made if we consider the circumstances that restrain the expression of it in regard to this particular problem. Again, on February 5th, 1909, in a speech at Liverpool, Lord Gorell said: "In Divorce Court procedure there is now one law for the rich and another for the poor." Further, four days later, on February 9th, in delivering his judgment in the Court of Appeal in a similar case to that which called forth Lord Gorell's condemnation in 1906, Lord Justice Fletcher Moulton said: "It is the serious reproach of our existing Divorce Laws that the relief they grant is practically out of the reach of the working classes in this country by reason of expense and the absence of local courts empowered to grant it," and again the press have uttered a universal expression of approval. The abuse remains untouched.[1]

[1] A Royal Commission was appointed only in October, 1909.

Yet family life is not too highly respected by those who regard rational divorce as an attack upon it. The whole tendency of modern legislation is to break up the family as a unit and to weaken parental responsibility for the child. To pauperise the poor and to provide for the illegitimate children of employees who earn less than £250 a year, at the expense of the employer, seems quite reasonable to the British public. In our traditional groove of coarse and unreflecting sentimentality we will give money to the poor and deny them the elements of self-respect. We subsidise their illegitimate children at the expense of their wives and legitimate children, but burden the rates with the maintenance of deserted wives whose husbands have disappeared, and deny to the offspring of illicit unions the simple justice of being legitimated by the subsequent marriage of their parents.

The absurdities of English law are most readily exposed by comparison with the law of more enlightened countries, and these absurdities cover a very wide range. For the moment, I will merely compare our laws with those of modern Germany.

In modern England the State is at present actively promoting in every police court the separation of husband and wife without the possibility of re-marriage, and it legalises and

enforces voluntary separations, both public and private, in every class of life. In modern Germany the separation without remarriage of husband and wife is not recognised by the State, except in the case of Roman Catholics, and even then a separation is subsequently convertible into a divorce at the option of either party. The remedy of the injured spouse is divorce or nothing. The remedy of separation, whether voluntary or compulsory, is rightly condemned as being contrary to public policy.

It may be instructive to mention one or two other features of German law in regard to marriage and family life. In England a male is deemed capable of marriage at 14 and a female at 12, and although parental consent is commonly demanded of persons under 21, any fraudulent statement of its having been obtained does not invalidate the ceremony. In Germany a male cannot marry under 21 or a female under 18, whether parental consent is available or not. In England a man may, and not infrequently does, cut his wife and family out of his will. In Germany the rights of wife and children are properly safeguarded by limiting this liberty of disposition. In England a father need not do more for his children than keep them out of the workhouse unless he has brought himself under divorce jurisdiction. In

Germany he is obliged to maintain them in a suitable manner. In England a spendthrift or dipsomaniac can only be controlled when he has spent all his money. In Germany such persons are protected from themselves by the family Council. In England an illegitimate child can never be legitimated by the subsequent marriage of the parents, though a child of perhaps doubtful paternity may rank as a dependant under the Workmen's Compensation Acts. In Germany this humane and reasonable opportunity of making reparation to the child exists as a matter of course.

In its essential principles the German law is in line with that of most civilised countries, while our law is not. There are, of course, historical reasons for this, which I shall discuss hereafter. But our law of divorce is only one example, among many, of our hidebound attachment to ancient abuses. It is of the utmost importance to realise that divorce law reform will merely bring our jurisprudence up to the level of the modern enlightened state. It involves no revolutionary disturbance of anything but our crusted ignorance of how modern civilisation works outside England. It sets out to place the family on a firmer basis, to regulate the marriage contract on equitable lines, and to improve the chances of the future generation in a country where deserted wives fill the

workhouses and 40,000 illegitimate children are born every year.

The anomalies of the English law, as distinct from other laws, are largely due to insularity. We have always tended to fall away from the main current of European thought and action. As Mr. Arthur Strong once remarked, "The English were never Catholics, but always turbulent islanders." Our insularity, in fact, usually took an anti-clerical form in the middle ages. (Since the Oxford Movement it now seems to take a clerical form.) Thus, when the humane provision of Canon Law for legitimation of children by subsequent marriage was laid before a Council of English barons, early in the thirteenth century, they refused to discuss it, and only cried out, "Nolumus leges Angliae mutare" ("We will not alter the laws of England"). The testamentary freedom of the husband grew up quite casually, and in the "province of York" was only established in 1692. But the main prejudice against the old law, which ensured the family a fixed proportion of personal property, was due to its ecclesiastical origin. The same sort of hostility seems to have existed in regard to the Court of Chancery, which was created to supply remedies which could not be found in the Common Law, and the very existence of such a Court did much to stunt the

growth and improvement of the Common Law.

It was only this insular feeling that enabled Henry VIII. to set up the "regal papacy" which the contemporary potentates of Europe failed to achieve, though they were all equally anxious to do so. It was our insular position that saved us from the upheaval of revolution in the eighteenth century. Revolutions have distinct disadvantages, but there can be no doubt that the French Revolution made a clean sweep of many ancient anomalies—feudal and otherwise—which continued to exist in England, and that many European countries gained enormously from the adoption of the Napoleonic Code.

All this goes some way to explain our deep-rooted veneration for the Common Law which grew out of English custom, and particularly the custom of the King's Court in the thirteenth century. Its obvious merits cannot be denied. It makes for liberty and individualism. Its theory is that men must sink or swim. It is so elastic and adaptable that in these respects it compares favourably nowadays with the more rigid and inflexible characteristics of modern equity. But it has marked traces of its barbarous origin. The relatives of a murdered man in the middle ages were content with a pecuniary compensation

from the murderer. By analogy, in our own day a man whose daughter is seduced, is entitled to sue the seducer for damages for loss of the daughter's service while she is with child, and an injured husband can sue the seducer of his wife for damages. In fact, before 1857, the injured husband could claim no relief from the civil law but that of damages.

Our law has always treated proprietary rights with more respect than personal rights. The poacher often fares worse than the wife-beater. It is only quite recently that criminals had any right of appeal, though endless facilities for appeal existed in civil suits. This probably accounts for a certain tendency in English legislation to busy itself mainly with taking money out of Peter's pocket to put it into Paul's.

A modern political programme turns almost exclusively on questions of property, *e.g.*, the rights of landlord and tenant, employer and employee, Free Trade and Protection, rival methods of taxation, and so forth. Educational and temperance reforms are fundamentally involved with large financial problems. Questions of *status* such as those of marriage, legitimacy, domicil, etc., are left severely alone, and such changes as have occurred were oddly casual and remote from legislative regulation. Medieval forms of marriage by consent existed till Lord Hardwicke's Act of 1753, and their

abolition excited strenuous opposition. We have preserved the medieval test of domicil in international law as opposed to the modern and more certain test of nationality.

English sentiment, in short, is curiously indifferent to any claim but that of poverty. It is conspicuously lacking in imagination. A young and good-looking criminal can always rely on a generous measure of popular benevolence. A young wife, condemned by her husband's desertion to all the miseries of indigent but perpetual widowhood, or a young husband, for ever tied to an incurable lunatic, makes no appeal to the British public, and the reiteration of rusty and senseless platitudes is all that they are likely to hear by way of sympathy.

It is, therefore, scarcely surprising that we have lamentably failed to regulate marriage and divorce after the pattern of modern civilisation, and that the existing anomalies of the law are still viewed with indifference. Such a state of things certainly justifies every effort to educate public opinion being made by those who, without any personal grievance in the matter, desire to remedy not only a grave social injustice but also a grave social danger.

DIVORCE LAW REFORM.

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There are still many worthy citizens in this country who are quite startled by the proposition that the poor should enjoy the same relief as the rich for their matrimonial troubles. Their surprise is usually of the kind that one would anticipate from suggesting that every poor man should have a City banquet once a week out of the public funds. In subsequent discussion they may argue, as the Archbishop of Canterbury did the other day, that to give facilities for the dissolution of a poor man's marriage in certain selected County Courts is "to lower the gravity of the ideal." In the end they will either perceive the logical force of the argument or will say that all divorce is very wrong, but no opponent of divorce, whether lay or clerical, has ever yet promoted any active measure for the repeal of the Matrimonial Causes Act, 1857.[1] In these circumstances, those politicians who oppose the

[1] Since this article was published Lord Halifax and his supporters have taken the hint.

extension of divorce to the poor, invariably evade all argument unless they are absolutely forced into it as they were on the 14th July, 1909, in the House of Lords.

I eagerly followed this debate in order to ascertain what possible arguments could be urged against giving the poor the enjoyment of the rights which they were expressly granted by the Divorce Act of 1857. The 40th section of the Act provides that "it shall be lawful for the Court to direct one or more issues to be tried in any Court of Common Law, and either *before a Judge of Assize* in any county or at the sittings for the trial of causes in London or Middlesex, and either by a special or common jury, in like manner as is now done by the Court of Chancery." This section was judicially interpreted in 1861 as intended to "empower the Court to delegate questions of fact in issue, which may be tried at a much more moderate expense in the country than in London, in the same manner as may be done by the Court of Chancery. . ." The Court ordered the cause in question (*Richards* v. *Richards*) to be tried at the next Shrewsbury Assizes to save expense. The last instance of this power being invoked was in 1871 in the case of *Snowball* v. *Snowball*, where an order was moved for that the issues of fact, which were cruelty and adultery, should be tried at the Assizes at Durham, as all the material witnesses

resided at or near that town, but this was declined on the objection of the husband, who had had to give security for costs and preferred to have the case tried in London.

The only possible objection to the use of this machinery is that the division of labour involved seems to a lawyer a little impracticable, but the mere existence of the section vindicates the principle that the poor are in law entitled to equal rights—the principle for which Samuel Romilly made heroic efforts in the early decades of the nineteenth century and for which the *Times* was vehemently fighting in 1854. It is a pity that the suggestion, made in the debates of 1857, that the County Courts should have divorce jurisdiction, was not then adopted; but whatever the means, the end cannot be repudiated. Justice must be brought as near the poor man's door as possible. The crushing expense of bringing witnesses to London and of leaving his work is imposed on the poor man *in this one instance only*. Such a hardship does not exist in the case of any other litigation. Moreover, as Lord Gorell pointed out, the wife of a provincial artisan, if she is backed by rich relations or a rich lover, has her husband at her mercy.

As I anticipated, the principal resource of Lord Gorell's opponents was to confuse the issues as skilfully as possible. All that the Archbishop of Canterbury could do was to lay stress upon the

slow decline of illegitimate births since 1857 and to argue that the separation orders granted by magistrates under the Summary Jurisdiction (Married Women) Act, 1895, had not increased the number, but this argument is clearly unconvincing having regard to the progressive decline of the general birth-rate. Certain items of miscellaneous information were also brought forward, the weight and importance of which were reduced to vanishing point by Mr. Plowden's letter on the subject in the *Times* of the 19th July.

The only other available resource was to suggest that justice of the poor must "open the door" to proposals for altering the English law of divorce as it stands. If this means that the present law is so iniquitous that it will not do to expose its abuses on a large scale, the objection cannot be allowed even from admirers of compromise. But the Archbishop, Lord Halifax, and Lord Halsbury unsparingly condemned the law as it now stands. This being the case, one would scarcely have expected them to nip in the bud an experiment which would expose the evils of divorce in all their nakedness and multiplicity. Allusions were made to the exuberance of American divorce in various States. The analogy is plainly ridiculous because in this country judges are not elected by popular vote, and are in fact very different in all

material respects from American judges. Our traditions of legal procedure and respect for law are happily not those of Dakota or even of New York. But if Lord Gorell's proposals were really likely to bring about such a state of things, what a golden opportunity was at hand for the opponents of divorce, after a proper interval of experiment, to abolish divorce altogether and to establish the idyllic conditions of a certain American State where, owing to the absence of divorce, the laws of succession are adapted to the complicated requirements of polygamy and concubinage![1]

The sober fact of the matter is that the official opponents of divorce have very good reason to fear the discussion of the question either on grounds of theology or public policy. No theologian can justify a poor man being divorced by his wife because his poverty and remoteness from London makes its impossible for him to defend the suit, and, on the general question of principle, the Rev. C. J. Shebbeare has conclusively exposed, in the August number of the *Nineteenth Century and After*, the historical ignorance of any Anglican who may seek to bolster up the strict Anglican theory of marriage by appealing to Catholic theory or practice.

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[1] I mean South Carolina.

As regards public policy no thinking person has ever ventured to deny that divorce must exist in some form or other, if only as a choice of evils.

Securus judicat orbis terrarum. The Roman Church chooses the legal fiction of annulment, the modern State chooses divorce. Any one who wishes to verify the history and reality of this proposition for himself need only study the admirable chapters on Marriage and Divorce in Mr. L. T. Hobhouse's "Morals and Evolution."

If the Assizes and County Courts are not available only one alternative remains, which is to give a magistrate's separation order the effect of a divorce after the lapse of a certain time (say two or five years) unless the parties are meanwhile reconciled. This is the scheme of a Bill once drafted by the Executive Committee of the Divorce Law Reform Union for Mr. Bottomley and which is now before the House of Commons. The machinery at least ensures cheapness and accessibility, but it might involve granting divorce for reasons of perhaps questionable necessity, such as an isolated act of cruelty or a short period of desertion. On the whole, Lord Gorell's proposals are unquestionably the best yet put forward to remedy a grievance the reality of which is beyond dispute.

The debate in the House of Lords ended by

the Lord Chancellor promising an inquiry into the question whether the County Courts should have divorce jurisdiction. It would since appear, however, that the Government are prepared to go further and to appoint a Royal Commission to investigate not only the disabilities of the poor but also the working of the present law under what has been called the "Concordat of 1857." It is earnestly to be hoped that such a Commission will be able to suggest some solution of the following problems, *i.e.* (1) the question of insanity; (2) the substitution of divorce for separation as a remedy; (3) the hopeless confusion and absurdity arising from the conflict of domicil and nationality in mixed marriages; and (4) the question of publicity.

(1) The question of insanity is by far the most difficult. In December, 1906, I suggested in the *Fortnightly Review* that divorce should be optional where the insanity of the spouse had continued uninterruptedly for five years and was certified by the Court doctors to be incurable. Those who look after lunatic asylums generally agree that the combination of the two tests is fairly safe. Thus melancholia may last for more than five years, yet it could rarely be certified as incurable. A marriage with a lunatic can never be annulled if the ceremony took place during what is called a

"lucid interval." Yet there are many cases to-day in which a person has been entrapped into marrying a lunatic by a mean and wicked conspiracy on the part of the lunatic's relations under such conditions that there is no means of repudiating the fraud. Such fraud is an outrage not only on the individual but also on the public interest, having regard to the possibility of lunatic issue. In legal language it is a crime as well as a wrong.

(2) The permanent separation of married persons is clearly against public policy. This was a recognised doctrine in English law up to about 1800, and it was not finally and logically discarded until the case of *Regina* v. *Jackson* in the eighties, when it was decided that a wife was entitled to desert her husband. Temporary separation may have its uses as a period of probation, but the permanent separation of husband and wife constitutes a permanent temptation to immorality unless the parties are either abnormal or well past middle age. This elementary fact is legally acknowledged in all Protestant countries but England and a few British colonies. The recognition of it was as much the fundamental principle of the excellent reforms advocated by Cranmer and other eminent divines in the reign of Henry VIII. as it is to-day of the humane jurisprudence that prevails in modern Germany. Yet in

England we are actively promoting and encouraging the separation of husband and wife without possibility of remarriage in every police-court, and legalising and enforcing voluntary deeds of separation in every rank of life. The effect of such deeds and police-court orders is to sanction libertinage on the part of the husband and to expose the wife to penury and social ruin if she is guilty of a single act of infidelity to a husband who is in fact no husband.

(3) The conflict of laws in mixed marriages leads to a person being married in one country and unmarried in another. The most recent and notorious case was that of a Frenchman who, without obtaining the parental consent required thereto by French law, married an English lady in England. The test of French jurisdiction is nationality, the test of English jurisdiction is domicil, and according to English law the domicil of the wife is that of the husband. In this case the Frenchman returned to France and took steps to annul the marriage on the ground of his parents not having given their consent. The English lady was no wife in France yet his wife in England because the marriage contract was valid in England. Her husband's domicil was clearly French, and this was held to prevent her from obtaining relief in the English Courts. For

England to abandon the test of domicil and to adopt the test of nationality would involve setting up a uniform law of marriage and divorce throughout the Empire, and the widest diversities prevail even between the laws of England, Scotland, and Ireland, to say nothing of the Channel Islands. The only practical solution would seem to be some modification of the rules which associate the domicil of the wife with that of the husband.[1]

(4) The publication of divorce proceedings as opposed to the publication of the decree inflicts grave injury on many individuals, and certainly is not in the public interest. Such publication is the exception rather than the rule in modern civilised countries. Its only advantage lies in the remote chance of publicity bringing fresh witnesses or evidence to light, but this scarcely outweighs the grave disadvantages. It cannot be more of a deterrent than the inevitable knowledge that the friends of the spouses must ultimately obtain of the result of the proceedings where one of them is guilty, while unfounded charges, if once published, must seriously prejudice the innocent. Unfounded charges are by no means unheard of. Moreover, newspaper reports of the kind that now exist

[1] I have suggested a further solution in a subsequent essay.

cannot but demoralise a large section of the public if only by emphasising and exaggerating the example of certain persons who do not represent normal society.[1] Shortly after the Divorce Act of 1857 came into operation Queen Victoria used her best endeavour to reform this state of things, but the Lord Chancellor of the day found himself powerless against the British dread of secrecy. There need be no reason for this fear so long as the Courts are open to the public, and the time has surely come to end a state of things which is equally injurious to the individual and the community.

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[1] I mean only cases which imply *real* guilt and not cases where one party commits a matrimonial offence with a view to divorce.

THE CHURCH AND DIVORCE LAW REFORM.

Reprinted from the FORTNIGHTLY REVIEW, April, 1910

"The Theologian may find peace in the thought that he is subject to the conditions of the age rather than one of its moving powers."—Jowett in *Essays and Reviews.*

During the last six years the movement for divorce law reform has made considerable progress, and has resulted in the appointment of a Royal Commission. Those who, like myself had been crying in the wilderness long before April, 1906, observed a very different state of opinion growing up after the famous judgment of that date in *Dodd* v. *Dodd.*[1] The Divorce Law Reform Union derives increasing support from the public, and, under their auspices, a Bill designed to make judicial separation decrees and magisterial separation orders mature into decrees of divorce and to relieve the spouses of lunatics and felons, was introduced into the House of Commons. An animated correspondence in the columns of the *Daily Telegraph*

[1] For the facts of this case, *see* p. 3.

during August and September, 1908, afforded striking evidence of the rising tide of discontent with the law as it now stands.

Finally the hearing, in 1909, of the now celebrated case of *Harriman* v. *Harriman*[1] before six judges in the Court of Appeal roused the public conscience by its reiterated exposure of the hardships of the poor, to which the case of *Dodd* v. *Dodd* had already drawn attention.

Even *The Times*, after pouring cold water on Lord Gorell's suggestions for reform in April, 1906, became aware in February, 1909, that the feelings of persons who, three years before, were alleged to repudiate the claims of public policy, might safely be postponed to the growing popular demand for equality before the law as between rich and poor. It is only odd that *The Times* should have taken the line that it did in April, 1906, after eloquently pleading for cheap and accessible divorces in 1854. One can only say, "*O tempora, O mores.*" *The Times* of 1854 had a reforming zeal only worthy of the *Daily Telegraph* in 1908, not to mention Sir Samuel Romilly a hundred years ago.

Meantime the clerical party had not been idle. In the Pan-Anglican Congress of 1908 Mr. G. W. E. Russell denounced persons who had remarried after divorce as guilty of "legalised concubinage."

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1 A case similar to *Dodd* v. *Dodd*.

Respectable citizens who have contracted such marriages may well ask Mr. Russell if he prefers illicit unions to lawful marriages, or if he would desire to repeat the advice of Pope Clement VII. to Henry VIII., to commit bigamy without obtaining a divorce?[1] Other speakers at the Congress anathematised divorce in a manner not unworthy of the Council of Trent, and fortified their remarks by divers allusions to divorces in the United States, where the administration of all justice is, to say the least, very different in character from what we are accustomed to obtain in Europe. Nevertheless, on January 7th, 1909, the Archbishop of Canterbury felt it his duty to admonish the Vicar of Charing that he was "not justified in repelling from Holy Communion" a lady who had divorced her first husband under the present law and had subsequently married a second husband in church.[2]

In view of all that has passed it is extremely important to understand the line that the Church is likely to take now, and the reasons that she can urge in opposition to rational divorce. If the Church is part of the Catholic Church, then she ought to provide the ecclesiastical facilities for annulling marriages that

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[1] *See* Lord Acton's Essays.

[2] The Bishop of Oxford wishes to repel all such persons, and has written a book in support of this view.

exist in the Catholic Church. If she is Protestant, then she ought to recognise the dissolubility of marriage for just cause after the example of Cranmer, Knox, and other Protestant reformers. If she represents a blend of Catholicism and Protestantism, then she ought to formulate an ideal consistent with the character of the blend. But she has merely shirked the problem, as I propose to show later, ever since the lamentable decease of Cranmer's *Reformatio legum ecclesiasticarum.*

Lawyers profess themselves unable to discover what is called the "law of the Church," whether written or unwritten. But if such a law exists, let us try to know what it is and how it bears on the subject of divorce. We are dealing with almost the oldest national institution in existence, and even "polite Sadducees" can scarcely desire that the Church should sever herself from the main stream of national progress. At present, however, it looks as if the official attitude of the Church is to be one of uncompromising hostility to any reform, even if such reform merely gives equal rights to rich and poor. Such an attitude will, of course, be taken with the hope of strong popular support, and all religious bodies can usually rely on the support of persons whose emotions dominate their reason.

The Catholic *ideal* of marriage as sacramental

and indissoluble must necessarily appeal to all. Few persons on the verge of marriage betray that desire for limited liability which Mr. Bernard Shaw dwells upon in his play, *Getting Married.* It is more human and generous to feel, as well as repeat, the formula, "For better, for worse." The preservation of such an ideal, *as an ideal,* is no doubt of vital importance to the welfare of the race. But the Catholic Church recognised that human institutions, however ideal, must be shaped by the realities of human life. She therefore solved the problem of divorce by the fiction of annulment as opposed to divorce. This fiction had all the uses of a legal fiction for preserving a legal principle. By a neat turn of casuistry, which in the middle ages even led to the expedient of fictitious genealogies, a marriage could be pronounced to be no marriage. In other words, the Church repudiated by a technical machinery the notion that any marriage could really have been celebrated between two parties who had imperfectly comprehended the beauty and glory of the sacrament which they were purporting to celebrate. It is, however, doubtful if the poor often, if ever, obtained any benefit from this procedure,[1] and in its practical application it frequently illustrated that astonishing divergence

[1] They do now.

between theory and practice which baffles the modern student of medieval history.[1]

In this connection, too, one must not forget that no such facilities now exist in the Ecclesiastical Courts of England, and clerical opponents of divorce would do well to ruminate upon this important difference between the Church of England and the Church of Rome. It at least demonstrates beyond question that the sacramental idea of marriage can only be an exemplar for an imperfect world, and that marriage was made for man, and not man for marriage. Moreover, in so far as this idea is based upon any superstitious regard for celibacy and virginity as such, it is not likely to win the approval of the modern European. It is clear, then, that the most exalted theory of marriage known to modern Europe has failed to solve the inherent difficulties of the problem.[2]

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1 The Church is no doubt less accommodating nowadays. But Pope Benedict XIV., in 1741, severely denounced the ease with which marriages were annulled, and the doctrine of "want of consent" receives a more elastic construction, even nowadays, in the ecclesiastical courts than in the English divorce court.

2 Ireland is sometimes cited as an example of severe sexual morality. But the Catholic Church must set off against this the very different state of things in Spain and Central and Southern Italy. There is also some reason to believe that Irish girls with child are shipped off to Glasgow and Liverpool for their confinements.

This consideration need no more deter those who feel themselves bound by such an ideal from following it than from respecting the early Christian denunciation of second marriages by widows or widowers as adultery. Nothing can be more touching than unwavering fidelity to the memory of a dead marriage or of a dead husband or wife, but what is to be gained by making it compulsory by legal or any other coercion? It is, therefore, unreasonable for the Church to rely upon nothing but emotions and ideals in a grave question of public policy.

The Church can, of course, always feel assured of support from the reaction of the human mind against the "intolerable impact of a new idea." I need only cite one instance of this. In 1753, Lord Hardwicke, then Lord Chancellor, carried a Bill for the abolition of "consensual" marriages which, though clandestinely celebrated by instantaneous or verbal interchange of consent, were indissoluble, and had led to widespread scandal and illegitimacy. Mr. Macqueen tells us that in regard to this admirable statute "it was said that even the legislature itself could hardly make void that which was valid by the law of God and the law of nature . . . For an Act of Parliament to declare nugatory and worthless that which had, in all ages, been deemed binding and religious, was something too dreadful to be thought of in a

Christian community." The more enlightened clergy will scarcely wish to count upon this kind of sentiment in making up their minds.

Finally there remains to be considered what the Archbishop of Canterbury calls "the conflict of Christian opinion on the subject," which is formidable enough. Among the Early Fathers who sanctioned remarriage after divorce, may be cited the illustrious names of Tertullian, Ambrose, Chrysostom, Hilary, and Justin Martyr. Archbishop Theodore of Canterbury sanctioned in the seventh century the remarriage of the innocent party, and also of the guilty party after two years, if repentant, though he did not consider such remarriage an ideal course.[1]

The final decision of the Catholic Church on the subject is not established even in Western Europe, beyond all doubt and exception, till the Council of Trent in 1563, up to which date the history of the question can be summarised in Gibbon's sentence: "The ambiguous Word of Christ is flexible to any interpretation that the wisdom of a legislator can demand." The "ambiguous Word of Christ" can scarcely be discussed to advantage in the pages of this

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1 Various other instances of conflict are forcibly set out in Mr. S. B. Kitchin's admirable "History of Divorce" (London, 1912.) In some parts of Europe the people refused to be bound by the Canon Law and observed their old customs.

book.[1] But the "ambiguity" was officially recognised in the resolution of the Pan-Anglican Congress in 1908, and it is clear that Christ's Words refer only to a "writing of divorcement" and not to any judicial process. It is at any rate not unimportant that the Greek Church and the reformed Churches recognise, and always have recognised, the validity and propriety of divorce as opposed to separation.

The history of divorce in England is not so well known as it ought to be on the ecclesiastical side. It is fairly common knowledge that Cranmer and others recommended a law of divorce that would have given liberty of remarriage in the case of adultery, cruelty, and desertion, and abolished permanent separation as opposed to divorce. At the Reformation the doctrine of sacrament in marriage was abandoned, and this revived the controversy whether marriage was of its nature indissoluble. An anonymous writer in the *Law Quarterly Review*[2] boldly asserted six years ago that there is no Canon of the Church of England either in the province of York or Canterbury which declares marriage indissoluble in itself.

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[1] My own point of view is too far removed from that of those who think textual criticism material to the subject, for me to discuss it.

[2] October, 1904.

The doubts that prevailed at any rate led to Cranmer, and various other Bishops, allowing Lord Northampton to divorce his first wife and marry another. Lord Northampton got the second marriage confirmed by an Act of Parliament, which was repealed under Queen Mary on the ground that the Act had been procured by untrue statements, but *not on the ground of marriage being indissoluble.* At the end of the sixteenth century the ecclesiastical sentence of divorce was held not to give liberty of remarriage; but the crucial issue was so far left unsettled that Laud in 1605 married the Earl of Devonshire to Lady Rich, whom Lord Rich had divorced for adultery with the Earl.[1]

When Lord Roos obtained a divorce by Act of Parliament in 1668, Cosin, Bishop of Durham, trenchantly argued that marriage was dissoluble on the ground of adultery, and in the case of a similar Act obtained by the Duke of Norfolk in 1700 the bishops used strong words about the "Popery" of those who thought otherwise. In 1809 it was proposed that such Acts should prohibit the remarriage of the guilty party, which the Archbishop of Canterbury, on behalf of himself and all the bishops, vehemently

1 A writer in the *Guardian* criticised me for not mentioning Laud's subsequent repentance, but I was not concerned with his state of mind. I am only concerned with the state of the law which allowed him to officiate.

opposed. He observed that, "by the *Divine law* there was a liberty to marry again, or else unquestionably the reverend Bench would before now have interposed." In need only be added that Archbishop Sumner and Tait, then Bishop of London, supported the Divorce Act of 1857. Is it really possible that all these facts were unknown to the majority of ecclesiastics, who, at the Pan-Anglican Congress, carried the resolution that "when an innocent person has, by means of a Court of Law, divorced a spouse for adultery, it is undesirable that such a contract (*i.e.*, to marry another person) should receive the blessing of the Church"?

Can it really be admitted that in a country where deserted wives crowd the workhouses, where close on 40,000 illegitimate children are born every year, where concubinage is so common that in the country districts of England deserted husbands and wives, debarred by poverty from obtaining divorces, dispense with the ceremony of marriage altogether, and where illegal unions are frequently condoned on moral grounds (according to Lord Courtney of Penwith's recent letter to *The Times*), the bishops and clergy can properly defend the "sanctity of the home" by appealing to precedents which are in fact no precedents? It is at least to be hoped that they will seriously study both history and theology before they deliberately censure the

appointment of a Royal Commission on the subject or the findings of such a Commission if appointed.[1]

Everyone recognises that divorce results from a choice of evils. Many men and women will deprecate suggestions of divorce by mutual consent (except possibly in the case of childless marriages) or suggestions that divorce should be granted in cases of inebriety, the drug-habit, or "ungovernable temper." The latter facilities might prove too strong a temptation for persons rendered unscrupulous by a guilty passion.[2] Others may desire a probationary period of separation as opposed to permanent separation. But it is at least clear that the law as it stands violates almost every principle of justice and morality, and that Englishmen are rapidly becoming aware of the fact. The bishops and clergy will not long succeed in retarding this revolt of the public conscience by arguments and exhortations of the type that many of them have hitherto adopted, and least of all by attempts at social or ecclesiastical boycott. It is rather for them to lead the way towards a

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1 The Bishop of Bristol suggested the appointment of such a Commission in 1896, and in 1907 the Bishop of Chester said that he would support the proposal.

2 Yet the long tale of crime due to the absence of reasonable divorce throws into the shade any criminality likely to result from any facilities for divorce.

reasonable monogamy at a time when even the institution of the family is being attacked by the Socialists whom they are so anxious not to offend.

ECCLESIASTICAL SURVIVALS IN DIVORCE.

Reprinted from the ENGLISH REVIEW, May, 1910.

The passionate reluctance of Englishmen to break with the past is nowhere more conspicuous than in the Matrimonial Causes Act of 1857. That Act introduced the quite new principle of divorce *a vinculo* in the Law Courts, but preserved almost in their entirety the old ecclesiastical remedies and procedure side by side with divorce. Fortunately, or unfortunately, the new wine of divorce has almost completely burst the old bottles of ecclesiasticism. Suits for judicial separation are fast decreasing, and the suit for restitution of conjugal rights has paradoxically enough become a recognised stepping stone to the dissolution of the marriage tie. The *status quo* bears about as close a relation to the ecclesiastical ideal as the mutilated law of real property to-day bears to the highly logical and symmetrical conveyancing of the period before 1845. Indeed, the ecclesiastical ideal was very definite and well reasoned, and it was certainly far less favourable to the separation of husband and wife than our present law is. For example, our present law differs from nearly every other

in preserving the legal husk of the marriage tie where both parties are at fault and claim freedom. It unites them for ever (in law, though not in fact) by the endearing tie of mutual injury. They are, no doubt, assumed (as Lord Stowell said in an old suit) to "find sources of mutual forgiveness in the humiliation of mutual guilt." "Forsan et haec meminisse juvabit" was the caustic remark of Lord Hannen when he exhorted two spouses to return to each other after a successfully defended divorce suit. Unluckily, human beings are usually not so forgiving—especially when all their most intimate disputes have been ventilated in the newspapers. So far as our law is concerned, such persons are turned back again into the world irrevocably fettered to memories of misery and disgrace. Even if one wishes to return to the other the Court does not allow any suit for restitution of conjugal rights.

The old Canon Law differed widely from ours. It inculcated and enforced the Christian duty of forgiveness. According to the Decretals of Gregory IX. it was decided that if *(e.g.)* a husband obtained a separation from his wife on the ground of her adultery and subsequently erred himself the Ecclesiastical Court must force the husband under pain of excommunication to return to the wife, Again, up to 1884 our law retained the relics of the ecclesiastical

machinery for enforcing the decree for restitution of conjugal rights. From their own point of view[1] the Canon lawyers supported the interests of society and the family, but the decaying survivals of the Canon law in our own day are nothing but a fantastic mockery of all that they were once designed to represent. Anglican dignitaries and others who uphold the *status quo*, seem to be quite ignorant of all this and suggest no alternative solution of the problem.

Since 1857 the suit for restitution of conjugal rights is only adopted by the wife either as a money demand or as a genteel preliminary to a divorce which is presumably not unwelcome to either party. For a husband it is since 1884 of no use at all. It may never have been of much use, yet Greville relates a romantic tale of the nineteenth century in which the wife was, according to the ecclesiastical traditions, compelled to return to her husband, and a happy marriage subsequently justified the litigious pertinacity which carried him up to the House of Lords. Moreover, in these days no judge would grant a decree of restitution to one of two guilty spouses, though on the other hand their mutual guilt equally debars them from divorce.

The medieval Church appears always to have been eager to presume marriage wherever

[1] The point of view of interfering with the most intimate human relations and deriving revenue therefrom.

possible, and to enforce the cohabitation of husband and wife, in spite of a decided laxity in annulling marriage for reasons which appear oddly frivolous to the modern student. This very laudable anxiety to promote reconciliation instead of separation without remarriage to some extent harmonises the view of the medieval Church with that of the modern State. I cannot imagine any Canonist contemplating with satisfaction our English encouragement of separation deeds and separation orders or the activities of the King's Proctor, who is employed by the State to prevent the divorce of guilty couples, but does nothing whatever to bring them together again.

The King's Proctor, whom I wish only to criticise in his strictly official capacity, has become almost a fetish of the English mind, though his activities in divorce date only from 1860. The contemplation of the guilt of the persons who are trapped by his espionage appears to blind the average newspaper editor to the grave considerations of public policy involved in the question. I desire to record that the *Westminster Gazette* has alone done me the honour of printing a letter on the subject, though I have written to many other journals.[1] Yet the official proceedings of the King's Proctor are condemned

[1] *John Bull* recently exposed the hardships in question.

as mischievous when successful, and productive of great hardship when unsuccessful, by every lawyer and layman with whom I have ever discussed the subject.

The *raison d'être* of the King's Proctor is to detect collusion and the concealment of material facts from the Court with a view to preventing divorce by consent and to enforcing the doctrine of recrimination.[1] In practice, however, the King's Proctor very rarely intervenes to prevent collusion—an offence which no person need commit who is wealthy enough to obtain skilled advice on the subject—and in order to obtain a decent proportion of successful interventions he has to employ most of his time in investigating the malicious gossip and tittle tattle of the poorer classes, who enjoy less privacy than the rich, and cannot afford the luxury of surreptitious trips on the Continent. Hence, a poor man who has saved money for years to obtain a divorce, often finds that he cannot get his decree made absolute without having to rebut a whole series of charges ranging back, as in one recent case, more than twenty years. Moreover, in nearly every case he is debarred, even if he succeeds, from recovering costs against the King's Proctor. This in nine cases out of ten spells financial ruin. If he is guilty he is

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1 This doctrine sprang from the Canon Law.

forced back into a concubinage which can only be outwardly respectable in the event of his contriving to escape gossip and blackmail. The same remarks hold good in the case of a wife, except that she is faced with the possibility of prostitution as well as the probability of concubinage.

It is always difficult to prove a negative, but, so far as I can ascertain, the Ecclesiastical Court before 1857 had no extra-judicial machinery for detecting collusion or enforcing recrimination, and even in 1857 it was thought that the hearing of every case by three judges would be a sufficient safeguard. The reasons for this are fairly obvious. It was not difficult for the parties to separate voluntarily, and towards the end of the eighteenth century the device of separation deeds began to grow up. If we omit financial considerations neither party had very much to gain from a separation, and a deed was obviously preferable, since a victorious petitioner who had not the means to obtain an Act of Parliament had to give a bond for at least £100 to live chastely after the decree.[1] This bond was presumably done away with by the statutory divorce if a private Act was subsequently obtained. Certain precautions, however, were taken in the House of Lords. The petitioner had to attend

[1] It would be interesting to ascertain how much revenue the Church obtained from these bonds.

for examination at the bar of the House on the second reading of the Bill, and the witnesses again gave evidence to prove the adultery.

Probably the principal safeguard against collusion in the Ecclesiastical Courts was the fact that a guilty party benefited financially by successful recrimination. Where the parties were in agreement on financial matters they were more than likely to be content with a separation deed. In this way the guilty party had a direct interest in bringing a counter-charge, and this is still the case in Scotland where the guilt of both parties only touches the question of finance and does not affect the dissolution of the marriage tie. Such a condition of things happily relieves the State from undertaking duties of an unpleasantly inquisitorial and detective nature.

The question of collusion naturally gave rise to much discussion in 1857, and, as I said before, it was enacted that three judges should try each suit. This caused such arrears in other work that the Matrimonial Causes Act, 1860, was passed to give the King's Proctor (who had previously existed as a Probate Official) or any other person power to intervene, after a decree *nisi* had been granted, to show cause why the said decree should not be made absolute "by reason of the same having been obtained by collusion or by reason of material facts not

brought before the Court." The bill was introduced in the Lords, who, much to the scandal of the Commons, inserted a clause that the King's Proctor should be re-imbursed by the Treasury for any deficiency of costs.

I am informed by my friend, Mr. Freke Palmer, that the King's Proctor used to intervene much more frequently than now, and that the resulting scandal led to a provision in the Matrimonial Causes Act 1878 that the King's Proctor might be mulcted in costs, but he was by the same Act entitled to apply to the Treasury for payment of these costs. Under this Act the taxpayer is still responsible for the mistakes of the King's Proctor, and the successful petitioner can only recover his costs by showing that the intervention was "unreasonable," which it is far from easy to do. The system is not likely to encourage caution on the part of the King's Proctor.

It seems scarcely necessary to recapitulate the evils of the present law on this point ranging, as they do, from grave hardship to individuals to the most important questions of public interest. It should not be difficult to suggest a better alternative.

The main questions are those of collusion and recrimination. Mr. Justice Bargrave Deane has defined collusion as an "*active* agreement" of the parties to procure a divorce. The clearest

cases are (1) that of a husband committing two matrimonial offences in order to be free of his wife with her concurrence, (2) that of either party bribing the other into an agreement not to defend or not to raise counter-charges.

It is clear not only that such cases are almost impossible to prevent if both parties are of the same mind and act discreetly, but also that the Attorney General, as in Scotland, would be quite as competent as the King's Proctor to intervene in cases of open scandal. In a limited sense (it may be said) divorce by consent must always exist. All that can be done is to make the process as much of an obstacle race as possible. The compulsion of one party to commit a matrimonial offence and the legal prohibition of any active agreement between the parties create a substantial deterrent against the parties rashly and unadvisedly embarking on so grave a step, or against one discontented spouse making life so intolerable for the other as to bring about a consent that is, in its origin, more one-sided than mutual.[1]

On the other hand the doctrine of recrimination is undoubtedly anti-social and mischievous in so far as it stands in the way of such marriages being dissolved. Moreover, the present system directly induces the suppression

1 This is the point of view of those who think divorce by consent too dangerous.

of material facts because the parties, in their anxiety to be rid of each other, have every motive to suppress counter-charges. It also involves grievous hardship to the citizen and unnecessary expense to the State. But the adoption of the Scottish system would give each party a financial motive for bringing all the facts before the Court, and this of itself would minimise the evils of clandestine collusion. The doctrine of coming to the Court "with clean hands" applies very sensibly to financial disputes but not to the public policy of divorce. The maintenance of the present system is neither logical nor expedient either according to ecclesiastical or civil notions.

For similar reasons it would be well to abolish the restitution suit now that it has lost all its old meaning. If either party consistently refuses to consort with the other such refusal should constitute the offence of desertion and should be established by evidence instead of by obsolete procedure.

It seems also inexpedient to allow separation as a remedy. If two spouses agree to live apart because they object to divorce as a remedy there is nothing to prevent them from doing so. But I cannot see why the law should assist them to live apart while still married if one of them subsequently changes his or her mind. Similarly I fail to see why either spouse should have the

option of separation or divorce as a remedy. If the essential conditions of marriage are frustrated and either party has good legal cause to be rid of the other, the law ought to grant divorce or nothing. If the injured party does not want divorce, then there remains the choice either of enduring for one reason or another the burden of an unhappy marriage, perhaps the noblest form of self-sacrifice that can be imagined, or of agreeing to live apart without any legal protection from molestation. But so long as our laws sanction separation without possibility of remarriage so long we shall continue to multiply irregular unions and to witness the misery and crime resulting from them, to say nothing of unnecessary illegitimacy. Even under the present law bigamy and concubinage have ceased to be as common among the well-to-do classes as they were before 1857. The same cannot be said of the classes who cannot afford divorce. But in all classes alike the establishment of a cheap and reasonable divorce law would raise the whole ideal of marriage, and it would add incalculably to the welfare and happiness of the nation. The existing state of things is indefensible; it has none of the merits, and nearly all the defects, of the Canon Law.

DOMICIL AND NATIONALITY.

Reprinted from the EYE WITNESS, 29th June, 1911.

It is gratifying to note that the Imperial Conference has arrived at some sort of an agreement in regard to "Imperial Nationality." Few lawyers grasped all the complications of being a British subject or of "Colonial Nationality" till the publication of Sir Francis Piggott's admirable and learned work on "Nationality" four years ago. There will now, it is hoped, be an Imperial nationality for which the qualification of five years residence in any part of the Empire will be as effectual as in the United Kingdom itself. Alongside of it will exist the "local nationality," which will vary according to the laws of each Colony, which prescribe different periods of residence.

If this movement for uniformity continues it may have great results. Nationality at present concerns a man's property very little —in the United Kingdom not at all—except as regards the capacity for owning ships. It gives

certain political privileges, but the law affecting marriage property and contracts has nothing to do with nationality, and in this respect differs entirely from the laws of continental nations. A contract according to English law (whether for sale or marriage) is good, if valid according to the laws of the country in which it is drawn up and made. Personal or "movable" property is dealt with according to the law of a man's domicil (except in the cases of bankruptcy or liability to income tax which turn upon residence), and although a marriage contract is good in England, whatever the domicil of the parties, it cannot be dissolved except in accordance with the law of the country which is the husband's domicil. (Land is dealt with according to the law of the country in which it is situate.) Clearly, therefore, the domicil is the most important test of all the English speaking world, yet it is of all tests the most uncertain. Professor Dicey, in his latest edition of the *Conflict of Laws*, admits the extraordinary difficulties surrounding the subject, especially in the case of what is called "Anglo-Indian domicil," and the possibility of determining the intention of the person whose domicil is called in question, for domicil depends entirely on (1) residence and (2) the intention to remain in the place of residence. In many cases it may be said that a person's

domicil cannot be decided till he dies, and even then, perhaps, not with certainty.

The doctrine of domicil grew up under the Roman Empire, which comprised many local systems of law, but only one citizenship. It became an essential doctrine of English law and is common to the English speaking world *except* where the test of residence alone has been substituted, *e.g.* for divorce jurisdiction in the United States, in India, and in one or two of the Colonies, *e.g.* New South Wales. In these later cases a conflict of laws at once arises between the tests of residence and domicil, so that *e.g.* a wife who obtains a divorce in New South Wales, finds that it is not recognised in England if the husband has an English domicil.

A different conflict arises between the laws of almost all continental countries and the laws of English speaking countries, because the continental jurists have adopted the tests of nationality instead of domicil. Anyone acquainted with the doctrine of the *renvoi* and with the liability to double death duties and general uncertainty of *status* in connection with marriage, divorce, and legitimacy resulting from this conflict must certainly agree that the present system is anomalous and defective.

The best solution of these difficulties would be:

(1) To establish an uniform nationality for the Empire coupled with the test of residence in regard to local laws, such as we should see in the United States if the Americans adopted residence instead of domicil as the test in every State.

(2) To substitute an uniform test of residence for domicil while safeguarding certain convenient doctrines by international, as well as imperial, convention.[1]

It is for instance highly inconvenient for a Frenchman to carry about with him an incapacity to marry under twenty-five without parental consent wherever he goes. If he marries an English-woman in England the French Courts must be induced to admit that the marriage contract is good if celebrated according to English law.

Again there is an obvious convenience in the old rule that land must be dealt with according to the law of the country where it is situate, and personal property according to the law of the domicil (or as I should prefer to have it, the law of the local nationality).

There is an obvious inconvenience in a colony like British Columbia exacting death duties on shares held in an industrial company trading in Vancouver by a deceased Englishman

[1] The worst obstacle to such a convention at present is our domicil test.

domiciled in England. A special order in Council enables the executors of the Englishman to recover the estate duty they have to pay on such shares before the will can be proved, but it does not relieve them from the nuisance of filling up forms to supply a vast quantity of absurd and irrelevant information compared with which Form 4 is positively pleasurable.

To establish the test of nationality would at once sweep away most of the worst cases of conflict between our own test of domicil and the continental test of residence. There would be comparatively little confusion as to what law should be applied in most cases. If an Englishman died in France his Imperial nationality would at once determine the principle that his *status* and property were in no way involved in any question of a French domicil, and his English "local nationality" acquired either by birth or residence would determine the rest. This would entirely fit in with the laws of the Continent.

The same facilities would make for uniformity in the marriage laws throughout the Empire. An Imperial subject living in *e.g.* the West Indies or the Channel Islands (where there is no divorce) would be entitled to obtain a divorce according to the law of England or Scotland or any colony by (say) five years'

residence. The period of residence and nationality are indisputable facts; the domicil is not. Take Scotland. A woman may divorce her husband in Scotland, yet the Scottish law permits her husband within *forty years* after the decree to go to the Court and annul the decree on the ground that his domicil was not, at the time of the suit, Scottish, although he may have put in no such defence at the time. A law which clearly could not be invoked except after a period of five years' continuous residence, without regard to what the husband's intentions were or where he happened to own houses or land, makes for order where the present law produces chaos. Under my system the husband will no longer be able to say, "I had property in Scotland, but I did not often reside there; I have now decided to let it, and my present intention is to die in Timbuctoo."

The test of residence would also solve the difficulties of a wife living apart from her husband because she might be allowed to acquire the right of invoking the laws of the country in which she resided, as she can to-day in England when she asks under the old ecclesiastical rule for a judicial separation or nullity of marriage, and this right would be recognised throughout the Empire.

Every day the tests of nationality and residence are gaining ground. Every day the

test of domicil gives rise to more complicated disputes. Unless we mend our ways in time the present confusion will become rapidly worse confounded.

THE PUBLICITY OF DIVORCE

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Soon after the Matrimonial Causes Act, 1857, came into operation Queen Victoria wrote to the Lord Chancellor of the day to complain of the demoralising tendency of divorce cases being reported in the newspapers, especially where the juvenile reader was concerned. The lawyers of that date did not see what could be done, and nothing was done. It was no doubt thought that publicity in this matter was no worse than in the case of police court cases or criminal trials, and, except in the instance of nullity suits on account of such causes as impotence or insanity, there has always been a tendency to regard any divorce proceedings as quasi-criminal in character and adultery as a quasi-criminal act.

The custom, having once been allowed to establish itself, has now found champions among those very moralists who would possibly have shared (or professed to share) Queen Victoria's views had they been her contemporaries at the date of her letter to the

Lord Chancellor. These gentry are frequently censorious and unimaginative persons who think that no divorce at all should be allowed, and that, short of that happy consummation, the parties should be "deterred" from obtaining a legal remedy by the exceptional unpleasantness of publicity. It follows that a wife who has been infected with a horrible disease, must be *deterred* from obtaining relief by advertising her condition to the world at large. A husband who is forced to take proceedings in the interest of his family, must be *deterred* by the knowledge that every sordid circumstance of the degrading tragedy and every kind of innuendo against his honour that a cross-examination may contain, will be discussed certainly throughout the British Isles and possibly throughout the English speaking world. The more sensitive party is to be *deterred* from defending a suit the publicity of which is no deterrent to the other party. Witnesses who could give vital evidence in support of an injured party must be *deterred* by the fear of publicity, in so far as it may affect them either in their chances of getting situations hereafter or in other indirect ways, from doing their duty as citizens. It is not as if moralists of this type usually refrained from reading the reports in question. It is often a treasured, if secret, recreation of theirs. Moreover the atmosphere

of suspicion which such reports engender in regard to the most innocent relations of the sexes, fortifies persons of this kind in the Pharisaical scandal-mongering to which they are frequently addicted. Without newspaper reports of divorce cases their occupation would be gone.

The attitude of the journalist has afforded a pleasing contrast to that of the Puritan. On the whole the Press has most creditably suppressed the worse and more offensive features of divorce cases, and the practice of sketching in Court has been voluntarily abandoned. An influential band of eminent journalists like Mr. Sidney Low have supported what must, from a commercial point of view, be in the nature of a self-denying ordinance. The very real humanity of the profession principally concerned might profitably be imitated by others not directly concerned.

The main arguments for suppressing newspaper reports of divorce proceedings are (1) the necessarily misleading incompleteness and inaccuracy of the reports, (2) the injustice to the parties, and (3) the possible effects on the newspaper-reading public. With these points I will shortly deal, but they do not meet the objection, which I admit, that full and proper reports are almost a necessity for practising lawyers and social or historical

students. The needs of the latter may not be so obvious as those of the former, yet I can imagine nothing so illuminating for the future student of our society in the nineteenth century as to trace through the law reports the changing conceptions of legal cruelty, or of the circumstances from which adultery may be properly inferred. To meet this objection it would be necessary to publish special reports at length, wherever the Court or the official reporter thought the suit sufficiently important, in a form which, although accessible to lawyers and students, would not be forced on the attention of the newspaper public from ten years of age upwards in the deplorable fashion that prevails to-day. This is the system that flourishes in regard to nullity suits, to the hearing of which the general public are not admitted, and the public would not tolerate the publication of nullity suits in the same fashion as divorce suits. To take another example, no one can admire certain works of Mr. Havelock Ellis more than I do, but it would be clearly undesirable to publish them serially in the columns of the *Daily Mail*, because it would result in their being read in a fashion not contemplated by the writer. Having suggested what I think would be a perfectly practicable substitute for the present practice, I need only dwell upon the three main defects in the present

practice as outlined above; and it may be remarked that even the existing evils will become a thousand times worse if the county courts are given divorce jurisdiction.

(1) The incompleteness and inaccuracy of newspaper reports must be obvious to anyone who has sat through a case and afterwards read the newspaper reports. I remember that in a suit in which I was professionally concerned, the whole case for the petitioner was fully reported, but by some inadvertence the case for the defence, which proved successful, was never reported. Scraps of evidence, of the counsel's speeches, or of the judge's summing up, selected according to the taste and fancy of the reporter, can scarcely be otherwise than misleading, and may be gravely prejudicial to innocent parties. There is, of course, no room for more, and many reporters have no specially legal training. I do not deny that this applies to all litigation, but it is particularly undesirable in cases where the most intimate problems of human conduct and reputation are in question.

(2) The injustice to the parties concerned has never been properly recognised. The grossly unintelligent and unimaginative attitude of the British public has never been adequately characterised except by the Princess Bariatinsky, who has recently given her impressions of the

Divorce Court to the *Evening Times*. She writes: "Men and women who are dragged to the Divorce Court are unhappy, shipwrecked people. They require sympathy and understanding, and instead they are made the quarry of the mob, the mob keen for scandals and gossip . . . I sat in court, and as I heard the attempts made to put the worst constructions on the most innocent of things I could have torn the skin off my face . . . I thought I must be living three hundred years back, in the days when they burned witches . . . They show souls tortured in their most intimate relations." Such are the impressions of an unprejudiced foreign observer coming from a country where, as in most other civilised countries, such cases are heard in private. The first case of the kind that I ever saw suggested the observation that our descendants would look on our Divorce Court as we look on the old public executions at Tyburn. To see the public cross-examination of a man or woman as to the inmost recesses of his or her private and domestic life is not so very far removed from seeing a human being disembowelled, and the torture is vastly aggravated by publication in newspapers.

Within the last ten years a dead woman has been publicly accused of adultery and her husband has had to come into Court to defend

her memory. Within the last ten years an unmarried girl has been dragged into the Divorce Court after a period of more than a year's suspense and had her name published in connection with the proceedings on the strength of evidence which partly consisted of a forged document. Moreover, when a charge has been trumped up and rebutted, who can ever say that the accused persons are properly cleared in the eyes of the world? I do not believe that any female respondent, or any man who is made a co-respondent, suffers much less severely from a favourable, than from an adverse, verdict or judicial decision. Yet, as the Princess Bariatinsky reminds us, it was Catherine the Great in the eighteenth century who remarked, "It is better to forgive ten guilty than punish one innocent." To publish names and results where a divorce petition succeeds is legitimate enough, but to publish all details broadcast in any event is a policy of cruel injustice.

(3) The effect of newspaper reports on the newspaper-reading public cannot fail to be demoralising. The more indecent police court cases and criminal trials are either not reported at all, or else are very meagrely reported. It is well known that such reports as exist lead to the reproduction of the crimes recorded. If the young are led into imitating the exploits

related in the police courts or in shilling shockers, are they less likely to imitate the actions of guilty parties in the Divorce Court, surrounded as they often are by an atmosphere of opulent or aristocratic glamour to which the reporter does more than justice? The reader does not see the drawn faces of the parties concerned; he only reads of a dazzling pseudo-romantic existence which affords a seemingly welcome contrast to the monotony of his own. An element of suggestiveness may be imported into the reader's relations, hitherto quite innocent, with persons of the opposite sex, and he or she may gain some quite useful hints in the art of observing the eleventh commandment. The Princess Bariatinsky quite fairly calls our Divorce Court "a nasty entertainment for nasty-minded people," and further observes, "Publicity only develops the taste for scandal." Why such an abomination should continue in a country which cannot tolerate cinematograph exhibitions of a boxing match, is to many English men and women perfectly inconceivable. The only possible explanation is that we are suffering from the type of Puritan whom Macaulay described as putting down bear-baiting not because it gave pain to the bear, but because it gave pleasure to the non-Puritan spectator. Our Puritan of to-day enjoys not only the spectacle of the

Divorce Court, but also the satisfaction of knowing that it gives pain to a vast number of persons, and particularly to those who, however foolishly or innocently, have strayed from the path of Puritan conventions. If he takes the trouble to try and get into the Court it would he churlish to keep him outside, but there is no reason why he should have pleasures of this kind brought to his breakfast-table every morning.

It is almost entirely due to the Puritan that the most squalid and miserable marriage in the world cannot be dissolved without one of the parties committing adultery, the very reason why publicity should be avoided. The Puritan cannot reasonably expect to eat his cake and have it too. There would be no objection to publishing the proceedings in the case of divorce for wilful desertion; but that would certainly not satisfy the Puritan.

CONCLUSION.

"A well-dressed woman was sold on Monday, in Smithfield Market, with a halter round her neck, to a decent looking man for 15s. The woman declared that the moment of her transfer was the happiest in her life, and the purchaser said that he would not take £10 for his bargain."—Extract from the *Observer* of Sunday, June 14th, 1812.

The above example of domestic bliss is culled from a period when divorce could only be obtained in the manner described by Mr. Justice Maule in 1845. The more efficient police of our day would no doubt have prosecuted the woman for bigamy, but she would still be unable to obtain a divorce for any reason, or even a police court separation if she was so presumptuous, in her poverty, as to resent her husband's adultery. Such is the progress of law and public opinion in the last hundred years. This state of things will probably last for another thirty years if the present disgraceful apathy of the British public

continues. The subject of Divorce Law Reform has reached the stage of discussion, and newspapers are ready to welcome it for the silly season when five years ago they were frightened of it, but scarcely any prominent politician will touch it, and not even the victims of the law will finance it, anonymously or otherwise. The rich can usually comply with the requirements of the law, such as compulsory adultery, but in any case they appear to have no sympathy whatever with the poor.

I propose in this essay to summarize the points of the preceding essays and to distinguish reforms which may fairly be called *non-contentious*, except on purely superstitious grounds, from those which may fairly be called *contentious*.

In the first place, I cannot see how any intelligent legislature can reasonably deny the right of divorce in all cases where it already grants the right of separation; I mean cases of desertion for two years, adultery of the husband, and persistent cruelty damaging the health of the injured spouse. It may be thought desirable to impose a time-limit (say, one year) so as not to "close the door on reconciliation" too abruptly, but on the other hand two years is a long period in the case of wilful and malicious desertion, and the period of desertion on which a magistrate

grants a police court separation order is usually about six months. In any case only those who profess to decide this matter by far from conclusive researches in textual criticism of the New Testament or by a partial interpretation of ecclesiastical authority, can defend the cruelty of making separation lifelong instead of probationary.

Secondly, the idea of permanently uniting two persons by the indissoluble tie of mutual adultery has only to be stated to show its inherent absurdity. If a husband and wife condone each other's infidelity in order to look after their children that is their own affair, but the element of compulsion is grotesque and preposterous.

Thirdly, it is universally admitted that something should be done to unify the marriage and divorce laws of the United Kingdom and the British Empire, and the principles which govern the international recognition of marriage and divorce. I need not recapitulate my arguments for substituting the tests of residence and local nationality for domicil within the Empire, and for bringing England into line with continental countries by also substituting the test of nationality for domicil. The principal difficulty that would, even after that, have to be solved, is the question of nationality imposing disabilities on marriage

among other nations. The laws of England (for example) decline to recognize that a Frenchman under 25 can carry about with him *wherever he goes* a disability to marry without parental consent. The English doctrine is that any marriage contract is good when made in accordance with the law of the country where it takes place. We might reasonably expect foreign countries to recognize this extremely convenient doctrine. It would only be fair for them to fall into line with us on this point if we abandoned our domicil test. It is to be hoped that such a convention may possibly be arranged within the next fifty years The international court at The Hague might be usefully occupied with such a problem if this country would only condescend to enter into conferences on the subject, but English lawyers have hitherto preferred to shirk the difficulties of it.

Coming to what may be called *contentious* points I group them under two heads (1) the question of divorce by mutual consent or by separation maturing into divorce, and (2) the question of divorce by reason of hardship as distinct from strictly matrimonial offences Under this second category I include the question of divorce for insanity, habitual drunkenness, or terms of long imprisonment.

I differ from most English and American

writers in thinking the second category much more contentious than the first, except where healthy persons have been induced to marry diseased persons by fraud and misrepresentation. Mr. Kitchin points out that according to the ancient customs of the Roman, Germanic, and Frankish peoples marriage was regarded as "the most intimate, the most important and the most venerable of all partnerships, in which husband and wife were equal partners. Being based on consent and affection alone, that partnership could be dissolved by the dissent of the parties when that affection had turned into aversion, without the necessity of having to disclose the secret causes of their dissension, and without having to prosecute each other before a public tribunal. This law remained the practice of Europe, and had the sanction of the Christian Emperors of Rome until the beginning of the Middle Ages, when the Churches, obtaining temporal power, began to replace it by laws based upon interpretations of the well known scriptural texts."

I must leave my readers to peruse Mr. Kitchin's excellent work if they want chapter and verse for these statements. I cannot help thinking that the book will convert them to Mr. Kitchin's conclusion. "That consent between the parties must necessarily mean collusion or fraud, could only emanate, as it did,

from the minds of medieval monks who treated the parties, as they are treated in modern law, as children." Such a doctrine is not unfairly classified with the old beliefs in witch-craft and in the punishment of heresy.

Owing to the influences of Frederick the Great and Napoleon, culminating in the *Code Napoléon* after the French Revolution, divorce by mutual consent, subject to certain safeguards for the maintenance of the family and against any sudden or capricious step, has become legal in Austria (for non-Catholics), Belgium, Roumania, Norway, Portugal, Japan and Mexico.[1] The same principle has been less nakedly admitted by the device of mutual separation, or separation obtained by one party for good reasons legally maturing into divorce, and this has been adopted in France, Germany, Denmark, and Holland. These facilities must of course exist side by side with the machinery for giving relief to a genuinely innocent party against a genuinely guilty party, but they at least preserve the institution of marriage and public morals generally from the contempt into which they are brought by collusive divorces,

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1 In Russia divorce can be obtained for incompatibility of temper or invincible repugnance. Mr. Havelock Ellis records the opinion of two clergymen in the East End that men and women in that district respect each other much more when not united by legal compulsion.

as in England, where respectable husbands often consider it their duty to jump through two preposterous paper hoops respectively labelled "refusal of conjugal rights" and "adultery," and where less respectable spouses either subject the other spouse to persistent espionage, or may even (as often among the poorer classes) be provoked into crimes of violence.

Mr. Kitchin makes lurid allusions in his chapter on the Middle Ages to the number of wives condemned as witches at the instigation of their husbands, and husbands denounced as heretics to the Inquisition by their wives. Yet in the modern newspaper nearly every column of police court news furnishes a few examples of crime and violence due to the absence of a cheap, reasonable, and civilised system of divorce. Even where divorce is practicable, the parties are frequently forced into bitter antagonism, where none need have existed under a civilised law. Practising lawyers find no difficulty in recollecting murders and suicides directly due to a system which, in its stupidity and publicity, is infinitely more barbaric than our ancestors' old amusement of bear-baiting.

What worse evils than all this could result from adopting the laws of more civilised countries than our own? Under our system a married man can ruin a girl with no more

than a contingent liability to pay 5s. a week. The same man would not marry, or cancel the marriage, rashly if he knew that he was incurring a liability to make suitable provision for a wife and family. Women might marry with a view to obtaining alimony from more than one husband, but this could easily be stopped by abolishing the absurd rule that an innocent wife should not lose any portion of her alimony from a divorced husband if she marries again.

Are children likely to suffer from not being brought up to the spectacle of perpetual scenes of violence between their parents? Such children are not generally very happy or healthy when they grow up. Is society at large likely to suffer any mortal wound from the amicable dissolution of marriages which lead at best to ruined happiness and at worst to murder and suicide? The institution of the family not only flourished in ancient Rome, but it flourishes also in the modern countries referred to above. It may be instructive to note that in Norway divorce is defined as "relief from misfortune." Its associations are not, as here, criminal or quasi-criminal.

The citizens of Madrid are recorded to have fiercely opposed a daring proposal to clean the streets of that city in the eighteenth century because the concentrated refuse was supposed

to temper the unhealthy severity of the climate. There are also people in modern England who oppose changes in the marriage laws on the ground that our marriage laws are the one great safeguard of public morals!

I come now to the question of divorce by reason of hardship as distinct from strictly matrimonial offences. Taken by itself the case of insanity is no doubt the least contentious, though it has been abandoned by some of the American States and is not a popular, though it is a legal, cause of divorce in Germany. Melancholia may last for very many years and yet be cured, and no doubt insanity will, in course of time, be much better understood and much more successfully treated than it is now. Even the Archbishop of York admits, however, that where a healthy spouse has been entrapped by fraud or misrepresentation into marrying a lunatic or epileptic, the marriage ought to be dissolved. The principal danger of giving the right of voluntary divorce for insanity is that the State might proceed to make it compulsory, and thus deprive the diseased spouse of all the ungrudging love and attention that would be given by the other.

The hatred of liberty now characteristic of the English governing classes might easily lead to some such display of tyranny, and the cynical contempt with which the English

middle classes ride roughshod over the family ties and affections of the poor, should be carefully guarded against. This is particularly important in the case of habitual drunkenness, where many members of the House of Commons would be only too ready to seclude, and possibly emasculate, any unfortunate person whom the police chose to denounce as being an habitual drunkard.[1] Moreover it is difficult to stop short at insanity when once the principle of disease is admitted. Such a disease as creeping paralysis may last for 20 or 30 years and destroy the companionship of marriage quite as effectually as insanity. In these cases the principle of divorce by mutual consent might settle the question; but however mistaken the diseased spouse might be in wishing to retain the other against his or her will, the Legislature might reasonably be loath to encourage a heartless spouse to repudiate the moral claims of the other. Much the same sort of reasoning applies to the question of divorce in cases of long sentences to imprisonment, especially in view of the criminal accusations that one spouse will sometimes trump up against the other in cases of mutual aversion, and judges would be greatly influenced in passing sentences by the knowledge that a sentence of a particular

[1] See the sweeping powers granted to officials by the Mental Deficiency Bill.

length might lead to the criminal being cut off from all domestic ties. All compulsory morality is of course worth but little, yet legislation establishes a sort of indirect moral sanction by what it allows and prohibits, and I should be strongly opposed to divorce in respect of any sentence less than ten years' duration.[1]

For the same reason I should favour divorce for insanity pronounced to be without doubt incurable, but not for any other diseases whatsoever, and I should consider it more important to obtain the reforms which I call "non-contentious" in the first place. But that is a mere matter of personal opinion. The point of really vital importance is to attack the purely superstitious foundations of the dogma that marriage is of itself indissoluble for any reason whatever, and to attack it with the same energy that one would use to suppress the burning of witches or heretics at the stake.

One very effective argument in this direction is to enumerate the quibbles and evasions that exist, and always have existed, in priest-ridden countries for annulling or dissolving marriage. My evidence before the Divorce Commission concerned this point, but I had neither the time

[1] For the same reason I am not in favour of Mr. Shaw's proposal to treat marriage as if it were merely in the same category as a promise to marry.

nor the opportunity to collect all the materials or to do full justice to the subject. I can only hope that some other person will find the necessary time and money for the purpose. I found that in Austria,[1] Italy, and Spain adultery was far less uncommon than in countries where divorce is allowed, even though adultery is a criminal offence in Spain and Italy. The commonest evasion in Austria is to adopt Hungarian nationality and to obtain a Hungarian divorce. The Italians have been vainly trying to obtain divorce for the last ten years, but have at least succeeded in twisting the law more and more into recognizing foreign decrees of divorce so that Italians more and more resort to Switzerland for the purpose just as the Canadians resort to the United States. In Italy there also exist various devices for getting marriages annulled either on complicated grounds of consanguinity or through the fiction of impotence.[2] In Spain there is the recent case of Francisco Ferrer, the free-thinker. His wife ran off to Russia and divorced him there, but he could not divorce her by reason of the Spanish law. Catholic

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1 Divorce is not allowed to Catholics in Austria even when they change their religion.

2 There are (I am told) a certain number of nullity decrees in England where the husband prefers being adjudged impotent by reason of refusing medical inspection, to committing adultery to order.

writers have consequently denounced him for his immorality in living with a devoted woman without being able to marry her.[1]

The same sort of results may be observed in the South American republics, only one of which has achieved a divorce law as distinct from facilities for annulment, and there is also a general tendency, as in South Carolina and some of the West Indian colonies, to a more or less recognized polygamy. There may of course be arguments for polygamy and also for drawing a very sharp distinction between lifelong marriage and other less permanent relations of the sexes, but the fact that such practices should co-exist with sacramental doctrines of marriage, and that women such as prostitutes should be treated with cruelty and contempt and deprived of legal safeguards by Catholic states professing Christian morality, may well lead Protestants and freethinkers to pay but little attention to Catholic denunciations of divorce as such. Catholic morality would appear not to inculcate any undue sensitiveness in regard to sexual laxity, or even in regard to crimes of violence due to matrimonial misery.

The practical point of all this discussion

[1] This is perhaps natural, as the Church engineered his murder in October, 1909, and does nothing by halves, but it is not humanly justifiable.

is, What is to happen in England? We may confidently presume that any reforms advocated by the Royal Commission will be shelved for some years to come.[1] The Act of 1857 was carried through by Lord Palmerston without any strong popular support, and since his day the opinions of enlightened ministers are far less likely to prevail. The Unionists would probably endanger any majority if they offended the Church, and the Liberals are not likely to be independent of the Irish vote, which would undoubtedly be recorded on strictly Catholic lines. The two parties are scarcely likely to combine in supporting any measure designed for liberty as opposed to coercion. There has scarcely ever before been any period of English Parliamentary history in which politicians have so cynically concentrated themselves as they have to-day on electioneering manœuvres to the exclusion of public-spirited reforms. What chance, then, have a deserving minority of obtaining attention from the Legislature?

There are only two practical methods to adopt. The first is to make the Church clearly understand that the Establishment can only last so long as the Church does not unreasonably interfere with the moral sense of the country. There can be no objection to

1 The Report of the Royal Commission in 1850 was only acted on in 1857.

the Church making her own rules for her own members, so long as she does not pretend to interfere with the private morality of the citizen who does not acknowledge her right to dictate to him what he should, or should not, do in this matter. The State can quite easily establish a system of compulsory civil marriage and leave the Church to do as she likes, but the Church must in that case abandon all claims to coerce or threaten any citizen who declines to accept her authority to settle these problems for the community at large.[1] Those who consider divorce law reform essential to the progress of morality must use every means to attain this end.

The second method is even more drastic. Those who desire to contract monogamous and permanent unions outside the law as it stands, must come forward and openly do so. Lawyers can easily devise some form of financial security for such unions such as mutual settlements or insurance for mutual benefit and gifts *inter vivos* for the benefit of the children of such unions. It is only five years ago that such unions outside the law existed in the case of deceased wife's sister marriages, and there are many of them to-day where the woman takes the man's name by deed poll and other appropriate methods are adopted. The parties

[1] The bishops must also abandon a policy of obstruction in the House of Lords.

at least enjoy the privilege of being separately assessed for income tax.

The important point is that all these people should *publicly* declare themselves as vindicating the rights of reasonable and moral persons against an iniquitous law. Such an attitude requires a rare degree of public spirit, but there are many honest men and women who would prefer making a plain and brave protest to having their alliance confused with dishonourable and mercenary attachments. Their position will be considerably strengthened by the existence of a Report by a Royal Commission advocating reforms to which the governing classes are too timid to give legal sanction, and in these days when minorities are bullied and disregarded for more or less corrupt reasons, it is probably their last and only resource.

Moreover, it is probably the only way of preventing any change in the law being made merely by way of concession to the Suffragist party. Nothing could be more disastrous to the national welfare than a statute which simply equalized the position of men and women in regard to adultery. It would immediately give rise to collusive adultery in all cases where matrimonial relief was desired, and it would prejudice a number of persons against divorce law reform as such. Women certainly suffer more than men from the present condition of the law, but

no measure of reform which did not also relieve the crying hardships of men, would be accepted by the nation as an honest remedy for the present state of things, and it would be a fatal error to arouse the very healthy elements of anti-Puritan feeling that exist in England, against an attempt to inaugurate matrimonial justice.[1]

It may perhaps be presumptuous to hope for success in a cause where More, Milton, Romilly, Mill, and many others have failed, but that is no reason why the attempt should not be renewed from generation to generation. From 1750 down to the present day great strides have been made in Europe towards a rational morality as opposed to a priest-ridden code of superstitious conduct.[2] Religion, on the whole, follows morality, instead of morality following religion. If England has lagged behind other countries in the department of sexual morality it is due to a certain timidity and insularity of thought as opposed to action. To all those who, like myself, love England and treasure the memories of her greatness, her pioneering achievements in the region of administration, of literature and art, of science, and particularly of

[1] I do not wish to follow Lord Mersey in defending isolated acts of male adultery, but many men, including Mr. Bernard Shaw, reasonably object to such an act being deemed more fatal to a happy marriage than wilful desertion or a long period of moral or physical cruelty.

[2] For details see my little pamphlet "Modern Morality and Modern Toleration," published by Watts & Co., for 3d.

justice between man and man all over the world, the record of her timidity and obscurantism in regard to matrimonial legislation, both before and since 1857, cannot be otherwise than deeply disappointing. There are perhaps signs of better things to come, but they are few and far between. In any case Englishmen who have explored this unhappy and discreditable phase of our national life and history, will never feel England completely great until some genuine effort has been made to clean this Augean stable. I need only refer to the published opinions on this subject of Sir Arthur Conan Doyle, who represents a very fine type of Englishman. The sanity and robustness of his general outlook on life cannot be questioned, and the gift of sympathetic imagination is not the least of his great gifts.

Those who admire his character and his intellect, can fairly be asked to take some interest in the Divorce Law Reform Union of 20, Copthall Avenue, E.C., for of that union Sir Arthur is president. He is content to champion a cause of little popularity in England. If that body obtained only a small fraction of the support that is ungrudgingly, and sometimes heedlessly, given to such societies as that for the Conversion of the Jews to Christianity, or to various sectarian institutions, it would probably be unnecessary to contemplate the possibility of openly contracting extra-legal unions.

BIBLIOGRAPHY.

Mr. Kitchin has given a short Bibliography on divorce at the end of his book, the "History of Divorce," published by Chapman and Hall Ltd. To the works enumerated in that Bibliography may profitably be added the following:—

DIVORCE. By Earl Russell. (1912).

THE QUESTION OF ENGLISH DIVORCE. (1912).

DIVORCE OR SEPARATION—WHICH? By Richard Gates. (Published by the Divorce Law Reform Union.)

STEPHEN'S COMMENTARIES ON THE LAWS OF ENGLAND. (The earlier editions are important for historical students.)

THE LAW OF DIVORCE. By J. F. McQueen. (1860.)

DIVORCE AND MATRIMONIAL CAUSES. By Gwynne Hall.

THE QUESTION OF DIVORCE. By Bishop Gore (now Bishop of Oxford.)

DIVORCE IN ITS ECCLESIASTICAL ASPECT. (A Rejoinder to the Bishop of Oxford.) By Viator.

DIVORCE AND MORALITY. By C. S. Bremner, with preface by Sir Arthur Conan Doyle.

THE CONFLICT OF LAWS. (Professor Dicey.)

HISTORY OF HUMAN MARRIAGE. (Dr. Westermarck.)

ORIGIN AND DEVELOPMENT OF MORAL IDEAS. (Dr. Westermarck.)

MARRIAGE MAKING AND MARRIAGE BREAKING. (Charles Tibbits.)

HALE'S CRIMINAL PRECEDENTS. (London, 1847.)

LYNDWOOD'S PROVINCIALE (being a treatise on the Canon Law published at Oxford in the 18th Century).

THE REPORT OF THE ROYAL COMMISSION IN 1850.

ELEMENTS OF ECCLESIASTICAL LAW. (Rev. S. B. Smith, D.D.)

THE PRINCIPLES OF GERMAN CIVIL LAW. (Dr. Schuster.)

CHAPTER ON DIVORCE IN "SEX IN RELATION TO SOCIETY" (being the 6th volume of "Studies in the Psychology of Sex.") By Havelock Ellis (published by Messrs. F. A. Davis and Co., in Philadelphia), but copies can be obtained from the author at Woodpecker, West Drayton, Middlesex. No student of the subject should omit this work.

MARRIAGE AND DIVORCE. (Canon Hensley Henson.)

W. HEFFER AND SONS LTD., 104, HILLS ROAD, CAMBRIDGE.